Supreme Court, U.S.
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No. 001363

In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of JABE J. FINCHER, SR., Deceased,

Petitioner,

v.

AMERADA HESS CORPORATION, AMOCO CORPORATION, ASHLAND OIL, INC., ATLANTIC RICHFIELD COMPANY, CROWN CENTRAL PETROLEUM CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION, HESS OIL VIRGIN ISLANDS CORPORATION, MARATHON OIL COMPANY, MONSANTO COMPANY, SHELL OIL COMPANY, SINCLAIR REFINING COMPANY, STANDARD OIL COMPANY, STANDARD OIL COMPANY OF INDIANA, SUN COMPANY, INC. (R&M), TEXACO, INC., UNION CARBIDE CORP., KEYSTONE TANKSHIP CORP., MARINE TRANSPORT LINES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the Alabama state trial court admittedly failed, in defiance of a mandatory court rule, to serve notice of entry of summary judgment against Petitioner Estate of Fincher, whether the Alabama Supreme Court's refusal to hear the merits of Fincher's appeal constitutes a denial of Due Process of Law?

Where the Alabama state trial court admittedly failed, in defiance of a mandatory court rule, to serve notice of entry of summary judgment against Petitioner Estate of Fincher, whether the Alabama Supreme Court's refusal to hear the merits of Fincher's appeal constitutes a denial of Equal Protection of the Laws?

PARTIES TO THE PROCEEDINGS

The caption under which this petition is filed lists all parties to the cause in the court below, the Alabama Supreme Court.

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CITATIONS TO OPINIONS ISSUED BELOW

None of the opinions or orders of the trial court, the Circuit Court of Mobile County, Alabama, were reported, either officially or unofficially. The December 1, 2000 opinion of the Alabama Supreme Court dismissing Estate of Fincher's appeal will be reported officially in the Southern Reporter, ___ So.2d ___ (Ala. 2000), and is reported unofficially at 2000 WL 1763257 and 2000 Ala. LEXIS 518 [App. 1-13].

STATEMENT OF JURISDICTION

Petitioner seeks review of the Opinion and Judgment of the Alabama Supreme Court dated December 1, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

Petitioner certifies pursuant to Rule 29.4(c) that this Petition has been served upon the Attorney-General for the State of Alabama.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> U.S. Const., Amdt. 14, § 1: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Rule of Civil Procedure 77(d):

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and who was not present in person or by that party's attorney or not otherwise notified, when such order or judgment was rendered, and make a note on the docket of the mailing. Such mailing is sufficient notice for all

purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions.

Alabama Const., Amendment 328 (excerpt)

§ 6.02(c) The supreme court shall have such appellate jurisdiction as may be provided by law.

Alabama Code § 12-2-7(1) (excerpt)

The Supreme Court shall have authority: (1) To exercise appellate coextensive with the state, under such restrictions and regulations as are prescribed by law[.]

Alabama Code § 12-22-2:

From any final judgment of the circuit court or probate court, an appeal lies to the appropriate appellate court as a matter of right by either party, or their personal representatives, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure.

Alabama Rule of Appellate Procedure 4(a)(1) (excerpt)

Except as otherwise provided herein, in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal . . . shall be filed

with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure.

STATEMENT OF THE CASE

Jabe J. Fincher, Senior, was a merchant mariner from 1942 to 1970, primarily sailing aboard tanker vessels. As alleged in the proceedings below, during his shipboard career he was exposed to benzene and other toxins. This exposure to benzene caused or contributed to the development of a blood cancer called acute myelogenous leukemia or "AML", from which Jabe Fincher died on November 23, 1991. [App. 16]

In November, 1994, Petitioner herein, Creighton E. Miller, Administrator of Fincher's estate, brought suit in the Circuit Court of Mobile County, Alabama, claiming against Fincher's shipowner-employers under the Jones Act, 46 U.S.C.App. § 688 et seq., and the General Admiralty and Maritime Law doctrine of unseaworthiness [App. 14-26]. Estate of Fincher also claimed against the product manufacturers under the law of products liability as incorporated in the General Admiralty and Maritime Law.

In the proceedings below Estate of Fincher was represented primarily by the Jaques Admiralty Law Firm of Detroit, Michigan, various attorneys of which were admitted to practice *pro hac vice*. Also appearing on the case was local counsel, Larry C. Moorer, who attended to such matters as filing pleadings and briefs prepared in Detroit, attending motion hearings, and the like. [App. 122]

Underlying Motion to Exclude Expert Testimony. After protracted litigation and shortly before the scheduled trial, in April 1999, the defendants moved to exclude all of Fincher's expert testimony on the ground that the opinions proffered failed to pass muster under the *Frye* Rule which still prevails in Alabama. Fincher vehemently opposed the Motion. Following the unrecorded argument,[1] the trial court issued a Docket Entry granting the motion but indicated, *sua sponte*, that it would certify the non-final ruling for interlocutory appeal. [App. 27[2]] Since Fincher was unable to make out a triable case for the jury on causation without his expert evidence, he promptly sought such certification, which was granted by docket entry on June 16, 1999. [App. 27] Fincher then filed a petition for interlocutory appeal to the Alabama Supreme Court. Although Defendants filed no opposition to that petition, on August 6, 1999, the Alabama Supreme Court denied interlocutory appeal without comment. [App. 28, 78] This left Fincher's case in a "limbo" in which he could neither get to the jury – nor to the appellate court.

Defendants Move for Summary Judgment. On August 12, 1999, defendants moved the trial court for

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[1] No record is made of oral arguments on motions in the Mobile County Circuit Court.

[2] Fincher includes an actual photocopy of the Docket Sheet in the Appendix so the Court may see that in Mobile County, Alabama the docket sheet is not a slick, computer database accessible via the Internet, as is true in many federal courts, but a most old-fashioned, hand-typed document with hand-written notations. Throughout the litigation – without fail until a final and appealable order came along – the trial court served local counsel by placing a copy of the order or relevant docket entry page in local counsel's courthouse box. See Affidavit of Larry C. Moorer. [App. 119-120]

summary judgment based upon the earlier ruling excluding the expert testimony. [App. 28] Fincher filed a Brief in opposition to the motion, accompanied by voluminous exhibits.[3] Argument was held at an unrecorded hearing on September 24, 1999, at which Estate of Fincher was represented by his local counsel, Larry C. Moorer.

Unfailing Service of Every *Non*-Appealable Order. At this point in time, the litigation had been in progress for nearly five years, and the trial court had issued numerous orders and rulings. The practice in Mobile County Circuit Court was for the clerk to give notice of the entry of orders and rulings by placing a copy of the written order or docket entry in the appropriate attorney mailbox located in the clerk's office. As a local attorney Mr. Moorer had his own court mailbox, which he checked *nearly every day*. [App. 120] For five years in the Fincher litigation the court clerk unfailingly served each court ruling by way of the courthouse box. [App. 120]

Events of September 24: Order Entered But Not Served.[4] Inexplicably, this practice ceased on September

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[3] Although these materials formed a large part of the record on appeal before the Alabama Supreme Court, it should be noted that plaintiff's opposition materials were not docketed by the clerk of the trial court. [App. 28] This is a significant omission, because Fincher's counsel has been faulted in these proceedings for not constantly checking the docket sheet.

[4] The affidavit of respondents' counsel reveals a sharp dispute concerning what transpired at the unrecorded September 24 motion hearing. Respondents contend that the trial judge actually ruled on the motion during the unrecorded proceeding. The Alabama Supreme Court never resolved the factual conflict, apparently taking the facts in the light most favorable to Fincher for purposes of deciding the motion to dismiss the appeal.

24, 1999. Mr. Moorer recalled arguing against the motion for summary judgment, after which he had to depart in haste as he had another court hearing to attend in another county. [Moorer Aff. ¶ 3, App. 119] Mr. Moorer spoke with Detroit counsel later that day by telephone and reported that the motion for summary judgment had been "taken under submission." [Krispin Aff. ¶ 5, App. 123][5] Unbeknownst to Fincher's counsel, later that same day the trial court signed an order granting summary judgment. [App. 86-87] It appears that the order was forwarded to the Clerk of Court for service upon counsel. For reasons which Fincher was unable precisely to ascertain, but which appear to be essentially that the Order "fell through the cracks", the court clerk never served the Order. It is undisputed that the order was never served upon Fincher.

Fincher's Counsel Checked at Courthouse Nearly Every Day. After the September 24 hearing Fincher's counsel, laboring under the well-founded, good-faith belief that the summary-judgment motion was under advisement, believed that the court was writing a memorandum opinion to explain its order resolving the summary judgment issues.[6] [App. 123, 126-127] Larry Moorer

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[5] This accords with what another of Fincher's Detroit counsel, J. Kelly Carley, was told by a member of the trial court's staff on September 22, two days before the hearing: "the judge was not going to rule on a summary judgment motion on the date of the hearing". [Carley Aff. ¶ 5, App. 126]

[6] This is hardly a novel or unreasonable conclusion, in this Court or any other. *See, e.g., Munn v. Illinois*, 94 U.S. 113, 136, 4 Otto 113 (1876) (cases kept under advisement for more than a year, "in order that their decision might be the result of our mature deliberations.").

continued to check his courthouse box nearly every day. [App. 120] Having received no notice to the contrary from the court-established mailbox distribution system, Fincher's counsel assumed that "no news was good news."

Belated Notice/Trial Court Extends Time for Appeal. Fincher's counsel had no notice whatsoever of the entry of a final appealable order until November 10, 1999, when Mr. Moorer received a telephone call from the trial court inquiring whether he wanted certain exhibits returned; that the court was purging the file because the appeal period had run. [App. 119, 127][7] Mr. Moorer called Detroit counsel; several phone calls followed between Detroit counsel (Mr. Carley) and various members of the trial court's staff. A member of the trial judge's staff indicated that Judge McDermott was aware that the failure to notify had occurred within the courthouse and not on the part of counsel. The court clerk intimated that the court was receptive to a request for relief and told counsel to put such request in writing. The following day was Veterans' Day, November 11, and the courthouse was closed. On November 12, 1999, Fincher filed a Motion to Extend Time to File Appeal as of Right, seeking relief pursuant to Ala.R.Civ.P. 77(d). [App. 28, 29-34] On November 15, 1999, Fincher filed a Notice of Appeal to the Alabama Supreme Court. [App. 28, 38-42] On December 2, 1999, the trial court granted the extension of time to appeal. [App. 28]

Alabama Supreme Court Dismisses Fincher's Appeal. On or about December 30, 1999, respondents filed a Motion to Dismiss Appeal in the Alabama

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[7] The usual 42-day appeal period had run five days earlier.

Supreme Court, arguing that the trial court abused its discretion in granting an extension of time to appeal. [App. 58-63] Fincher filed extensive papers in opposition [App. 91 *et seq.*], including three affidavits of counsel. [App. 118-128] On December 1, 2000, the court handed down its opinion, dismissing Fincher's appeal as untimely and declining to reach the merits. [App. 1-9] There was a vociferous dissent by Justice Cook. [App. 9-13] From this decision Fincher now brings his Petition for Certiorari.

CITATIONS TO THE RECORD CONCERNING FEDERAL QUESTIONS

The undisputed failure to give notice of an appealable order, despite the legal mandate requiring that such notice be given, inherently raises issues of whether Due Process of Law as required by the Fourteenth Amendment was afforded by the Alabama state court. There was no reason to raise the dispute to a constitutional level until the Alabama Supreme Court interpreted and applied its rule of civil procedure in such a way as to deny Fincher due process.[8] Fincher repeatedly claimed (without dispute) that the court clerk never served his

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[8] In *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 81, 523 N.E.2d 851 (Ohio 1988), the court rejected an argument on near-identical facts to the effect that appellant had failed to raise the issue below, stating: "[T]he issue could not possibly have been raised before the trial court because the issue arose only after the decision of the court had been made. The issue concerns the procedure for notifying the parties of a judgment entry after the trial court decision, and not any matter heard in the trial court."

counsel with a copy of the order granting summary judgment, and points to the following statements of record:

(1) Plaintiff's Motion to Extend Time to File Appeal as of Right [App. 29] ("Plaintiff had no notice of the Court's ruling . . . until Wednesday, November 10, 1999.")

(2) Brief in Support of Plaintiff's Motion to Extend Time to File Appeal as of Right [App. 31] ("[Plaintiff] did not learn of the Court's entry of summary judgment until Wednesday, November 10, 1999 – five days after the normal 42-day period to appeal had expired.");

[App. 32] ("That Order was never served upon counsel."); [App. 33] ("A.R.C.P. . . . requires that notice be given of the entry of orders or judgments.")

(3) Letter from Fincher's counsel to trial judge [App. 43] ("Plaintiff wishes the record to be clear that once he had notice of the Court's September 24, 1999 summary judgment ruling, he acted quickly to assert his rights.")

(4) Fincher's Docketing Statement to Supreme Court of Alabama [App. 56-57]:

> On September 24, 1999, the trial court signed an Order granting summary judgment and dismissing all remaining claims. That Order was never served upon Plaintiff's counsel, who did not learn of the Order until November 10, 1999. Upon learning of the issuance of the Order, Plaintiff promptly filed a motion with the trial court pursuant to A.R.Civ.P. 7(d), asking that court to extend the time to file his Notice of Appeal.

(5) Fincher's Brief in Support of Motion for Extension of Time filed in Alabama Supreme Court [App. 81-82]:

> Those various rulings became final with the trial court's issuance of a summary judgment Order

> on September 24, 1999. However, that Order was never served upon counsel, and counsel first learned of the Order on November 10, 1999 . . .

(6) Fincher's Brief in Opposition to Motion to Dismiss Appeal: [App. 94] ("The facts of the case – the failure of the clerk to give notice of the Summary Judgment Order, counsel's diligence in checking on the status of the case – were known to the trial court."); [App. 95] (Citing a decision in which appellant claimed, "as does Estate of Fincher in this case – that they had not received notice of the ruling in question, and that their counsel had been diligent in following the status of their case."); [App. 102] ("It is undisputed that lead counsel in Detroit had no notice whatsoever of the entry of summary judgment until November 10, 1999"); [App. 104] (Fincher's counsel explained to court clerk that "we had not received a ruling"); [App. 104] court employee explained that

> there had been some mix-up between the judge's chambers and the office of the clerk of the court. She stated the ruling had never been given to the attorneys, as was the court's procedure. . . . She explained that Judge McDermott knew of the mix-up and would entertain a request for an extension of time to appeal.

[App. 105] ("Every ruling that has been issued in the Fincher litigation has been distributed through the courthouse box. . . . I never received any formal order or judgment, margin order, or docket sheet entry indicating that the motion for summary judgment had been ruled upon."); [App. 107] ("[A]n extension of time to appeal is in order where, as here, counsel make a diligent effort to keep abreast of case developments, but nevertheless fail

to learn of the entry of an appealable order or judgment."); [App. 108] ("It is undisputed that the trial court clerk failed to serve or otherwise give notice of the order granting summary judgment, and that local counsel checked at the courthouse nearly every day to see if such an order had been entered."); [App. 109] (citing Alabama decision stating that "every litigant must receive fair and just treatment from the court system of this State."); [App. 111] ("it is undisputed that the parties never received notice of the order through the court clerk"); [App. 112] (noting "lack of notice of the order"); [App. 114] (quotation from *Etherton v. City of Homewood*, 700 So.2d 1374, 1378 (Ala. 1997)):

> The dismissal of an appeal as untimely in a case in which the judiciary itself failed to follow the mandates of Rule 77(d) and thereby caused the untimeliness would not be "just." Indeed, it would be particularly repugnant, not only to the tenor of the rules, but also to justice, equity, and the integrity of the institution. It would be inequitable and unjust to hold a party strictly to the provisions of Rule 77(d) if the judiciary itself does not comply with them.

(7) Affidavit of Larry C. Moorer, Fincher's Local Counsel: [App. 119-120] (never received notice until November 10, 1999; trial judges in Mobile County follow uniform practice of distribution of orders via courthouse boxes)

(8) Affidavit of J. Kelly Carley, One of Fincher's Detroit Counsel: [App. 127] (learned of summary judgment on November 10, 1999)

(9) Majority Opinion of Alabama Supreme Court: [App. 1 et seq.]

(10) Dissenting Opinion of Justice Cook: [App. 10] (Rule 77(d) requires notice by clerk; the rule is not "aspirational"; Ala.R.Civ.P. 1(c) requires "just . . . determination of every action") (quoting language from *Etherton v. City of Homewood*, 700 So.2d 1374, 1378 (Ala. 1997, *supra*)); [App. 12-13] (rule holding that counsel cannot rely upon mandatory notice procedure of Rule 77(d) "is neither necessary nor practical. It will not 'secure,' but, rather, will impede, the 'just, speedy and inexpensive determination of every action.' ").

REASONS FOR ALLOWANCE OF THE WRIT

THE ALABAMA SUPREME COURT'S DECISION FLIES IN THE FACE OF THIS COURT'S DECISIONS REQUIRING NOTICE PRIOR TO LOSS OF SUBSTANTIAL RIGHTS.

"The law never acts by stealth; it condemns no one unheard." *Moredock v. Kirby*, 118 F. 180, 185 (C.C.W.D.Ky. 1902) (emphasis supplied). The requirement of notice is grounded on something just as fundamental as the Constitution: on the sense of basic fair play prevailing in the community. That sense of fair play cannot but be offended by the undisputed facts of this case: a state court's admitted violation of its mandatory, statutory duty to give litigants notice of the entry of court orders and judgments.

Hill v. Hawes, 320 U.S. 520 (1944), is "on all fours" with the facts of Fincher's case. In that venerable decision this Court held that the trial court properly granted relief to permit a losing party to litigation to exercise its right of appeal where the court clerk failed to perform its statutory duty to give notice. The opinion states,

> It is true that Rule 77(d)[9] does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given.

320 U.S. at 523. *Hill v. Hawes* was decided under the rubric of common law governing application of rules of civil procedure; the case was not litigated on constitutional grounds.

Hill v. Hawes involved a balancing of different interests: the interest in affording the litigant his proverbial "day in court", albeit appellate court; versus the interest in finality of judgments. Like every decision by this Court, *Hill v. Hawes* had its share of critics, and in 1948 Fed.R.Civ.P. 77(d) was amended to provide that the time for appeal would run, regardless of whether the clerk performed what was supposed to be a mandatory duty to give notice. Yet the question whether the rule of *Hill v. Hawes* is constitutionally required has never been passed upon by this Court.

THIS COURT'S DECISIONS SUPPORT FINCHER'S RIGHT TO NOTICE FROM A STATE COURT PRIOR TO DEPRIVATION OF HIS RIGHT TO AN APPEAL.

The concept of due process that has evolved in the more than half-century since *Hill v. Hawes* requires that the entitlement to notice from a court be recognized as of constitutional dimension. In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), this Court held that a

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[9] Fed.R.Civ.P. 77(d), upon which the Alabama rule at issue is patterned.

mortgage holder had not received constitutionally adequate notice of a county-sponsored tax sale. Like Fincher, the mortgage holder did not learn of the adverse action until statutory periods to seek relief had run. The Court reversed, stating that "The county's use of . . . less reliable forms of notice is not reasonable where, as here 'an inexpensive and efficient mechanism such as mail service is available.' *Greene v. Lindsey*, 456 U.S., at 455." It was argued that Mennonite Board ought to have been keeping track of county records itself to ascertain whether proceedings affecting its rights were likely to occur. This Court squarely rejected that argument:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. . . . *[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.*

462 U.S. at 799 (emphasis added).[10] A State may not "forgo even the relatively modest administrative burden of providing notice by mail[11] to parties who are

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[10] A similar argument was rejected in *New York v. New York, N.H. & H. R.R. Co.*, 344 U.S. 293, 297 (1953), as well as *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 83, 523 N.E.2d 851 (Ohio 1988) (suggestion that appellants should "call the trial court each day to see if and when the judge signed the [judgment] entry" rejected as "not only impractical and unnecessarily burdensome, but it should also be apparent that such a course of action might also be against an appellant's best interests."

[11] In the instant case, it is undisputed that the court clerk did not even have to expend the minimal postage to send a copy of the order: All that was necessary was to place a copy of the

particularly resourceful." 462 U.S. at 799-800. The Court concluded:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

462 U.S. at 800 (italics in the original).

In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the Court applied the principles from *Mennonite Board* to strike down a state statute permitting a procedure that would bar claims against a probate estate on notice by publication. The Court found "significant state action" since the state court -- as in Fincher's case -- was involved throughout the proceeding. Recognizing that while the state has an interest in expeditious resolution of legal proceedings, nonetheless "a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted" (485 U.S. at 490); "If appellant's identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process" (485 U.S. at 491).[12]

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order in Mr. Moorer's courthouse box, a facility provided and maintained by the court.

[12] In the instant case there is no dispute that the court was well aware of the names, addresses, telephone numbers and fax numbers of both Fincher's local counsel and his Detroit counsel. "Where the names and post office addresses of those affected by

More recent decisions reaffirm these principles. In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988), this Court held a default judgment entered without notice "constitutionally infirm".

In *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 799 (1996), this Court characterized failure to give notice as "troubling":

> [A]s we explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 [314] (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

Earlier decisions are to similar effect. In *Griffin v. Griffin*, 327 U.S. 220 (1946), this Court set aside a judgment of favor of an ex-wife against an ex-husband for alimony arrearages. The order and subsequent judgment entered against the ex-husband for unpaid alimony were entered ex parte and without notice to the husband. The judgment was held null and void for want of due process, even though the ex parte order and judgment were permitted under New York procedure.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court struck down a New York statute permitting service of notice by publication of a legal

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a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). *Accord, Walker v. City of Hutchinson, Kansas*, 352 U.S. 112, 116 (1956) ("In the present case there seem to be no compelling or even persuasive reasons why . . . direct notice cannot be given.")

proceeding which could result in loss of rights by beneficiaries of a common trust fund.[13] After discussing the nature of the rights of the beneficiaries, the Court states:

> Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

339 U.S. at 313. The Court observed that

> The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 [1914]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

339 U.S. at 314.

In *Walker v. City of Hutchinson, Kansas*, 352 U.S. 112, 115 (1956), the Court acknowledges that "The right to a hearing is meaningless without notice." 352 U.S. at 115. *Walker* refers to the rule established in *Mullane* "that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."

THE UNDISPUTED FAILURE OF THE ALABAMA STATE COURT TO PLAY BY ITS OWN RULES DEPRIVED ESTATE OF FINCHER OF DUE PROCESS OF LAW.

Due process of law is process due according to the law of the land. *Walker v. Sauvinet*, 92 U.S. 90, 2 Otto 90 (1875). Implicit in the concept of due process is the idea

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[13] Any right to object was "sealed and wholly terminated by the decree". 339 U.S. at 311.

that "government . . . must follow its own rules." *Layton v. Swapp*, 484 F.Supp. 958, 961 (D. Utah 1979). As aptly stated in *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988), "The court wrote its own rules; it must abide by them." Likewise, "attorneys have the right to rely upon the rules. A court cannot ignore and circumvent its rules at will to the detriment of those covered by them." 853 F.2d at 390.

The premise upon which the Alabama decision rests – that after five years of consistent service of notice of non-appealable orders in conformance with a mandatory provision of law, a litigant acting in good faith may be deprived of his statutory right to appeal through a court's failure to make service – is a declaration that arbitrary action by state government[14] is permissible. "The touchstone of due process is protection of the individual against arbitrary action of government", this Court has written.[15] A rule holding, in effect, that a state court may alternately give and withhold notice, as suits its whim, is

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[14] The action of state courts is to be regarded as state action for purposes of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972).

[15] *Wolff v. McDonnell*, 418 U.S. 539 (1974), citing, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). The dictionary definitions of "arbitrary" include: "depending on choice or discretion"; "arising from unrestrained exercise of the will, caprice, or personal preference"; "selected at random"; "based on random or convenient selection or choice rather than on reason or nature"; "given to willful irrational choices and demands". New Third International Dictionary.

the denial of "fundamental procedural fairness"[16] that due process demands.

The decisions of this Court are clear that where a provision of law – be it statute, court rule, administrative regulation or legislative procedure – specifies a particular procedure, due process requires that the "process due" is the very process *specified* in that provision of law.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), the petitioner attacked the validity of the Board of Immigration Appeals' denial of his application for suspension of deportation. Accardi claimed that the Attorney General had made a fair hearing of his case impossible by circulating to the Board a list of certain "unsavory characters", including Accardi, whose deportation he desired. This Court, in granting certiorari, noted as the "crucial question"

> whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto.

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[16] *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). *See also Abraham v. Wood County Regional Water & Sewer Dist.*, 107 Ohio App.3d 773, 779, 669 N.E.2d 514, 518 (1995) (litigants were denied fundamental fairness where water service authority ceded its rule-making authority to executive director, who, in turn, "failed to establish any static rules or procedure", instead setting rules by whim: "It is the fluidity of this governing procedure that offends common notions of fairness, as citizens are entitled to rely on the official directives from their government."); *Cox v. Armour Fertilizer Works*, 237 U.S. 413 (1915) (hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law that Constitution requires).

347 U.S. at 265. The Court observed that the regulations, which possessed "the force and effect of law," "prescribe[d] the procedure to be followed in processing an alien's application for suspension of deportation." *Id.* The applicable regulations required that the *Board*, and not the Attorney General, exercise independent discretion to decide such applications. The Court found that the Attorney General's actions amounted to "dictating the Board's decision." 347 U.S. at 267. Since such actions were inconsisent with the "prescribed procedure," the Court set aside the decision below, stating that petitioner was entitled to

> a fair hearing, *which is nothing more than what the regulations accord petitioner as a right*. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. . . . [A]t least he will have been afforded that due process required by the regulations in such proceedings.

347 U.S. at 268 (both forms of emphasis supplied).

Similarly, in *Yellin v. United States*, 374 U.S. 109 (1963), this Court reversed a contempt conviction based upon a refusal to answer questions before a Congressional committee during a public hearing. Pursuant to one of the committee's own rules (Rule IV), the witness had requested that his testimony be taken in executive session, rather than a public forum. This Court concluded that "the Committee failed to exercise its discretion according to the standards which Yellin had a right to have considered." 374 U.S. at 120. The Court, citing the *Accardi* decision, noted that while on remand Yellin might or might not prevail, he was "entitled to have the Committee follow its rules and give him the consideration according to the standards it has adopted in Rule IV." *Id.*

The same principle was well-stated by the Second Circuit in *Montilla v. I.N.S.*, 926 F.2d 162, 164 (2d Cir. 1991), where the court set aside an agency ruling based upon the fact that the tribunal had failed to follow its own rules:

> The notion of fair play animating [the Fifth] amendment precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rulemaker may then with impunity ignore or disregard as it sees fit. The INS may not fairly administer the immigration laws on the notion that on some occasions its rules are made to be broken.

See also Hollingsworth v. Balcom, 441 F.2d 419, 421 (6th Cir. 1971) ("rules and regulations must be followed in order to comply with the requirement of basic fairness implicit in the concept of due process of law.").

THE STATE COURT'S HAPHAZARD ADHERENCE TO THE SUPPOSEDLY MANDATORY RULE OF NOTICE VIOLATES FINCHER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

While it has never been held that a state is absolutely required to establish a system of appellate courts and review, an unbroken line of decisions of this Court recognize that "a statutory review is important and must be exercised without discrimination". *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954). While States are not required to establish "avenues of appellate review", once established, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). *See also Ross v. Moffitt*, 417 U.S. 600, 612 (1974); *Griffin v. Illinois*, 351 U.S. 12, 18

(1956); *Dowd v. United States*, 340 U.S. 206, 208 (1951). As this Court said in *Lindsey v. Normet*, 405 U.S. 56 (1972) "When an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." The rule was well-stated in *Allen v. Duckworth*, 6 F.3d 458, 459-460 (7th Cir. 1993):

> a state is not permitted with one hand to grant such right [to appeal] and with the other to take it away in an arbitrary fashion.

As a litigant against which a final judgment had been entered in the circuit court, Estate of Fincher possessed an appeal as of right pursuant to Alabama Code § 12-22-2. Fincher's causes of action arising under maritime law are property rights protected by the Fourteenth Amendment.[17] The Alabama state court impermissibly denied Fincher equal protection of its law requiring that notice be given of court orders and judgments, unlike other litigants who are routinely and properly notified.

THE ALABAMA SUPREME COURT'S DECISION DIVESTING PETITIONER OF HIS RIGHT TO APPELLATE REVIEW IS IN DIRECT CONFLICT WITH THE OHIO SUPREME COURT'S DECISIONS HOLDING THAT NOTICE OF AN APPEALABLE ORDER MUST BE GIVEN.

Moldavan v. Cuyahoga County Welfare Dept., 25 Ohio St.3d 293, 496 N.E.2d 466 (Ohio 1986), follows the same basic fact pattern presented by Fincher's case. Counsel

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[17] *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988); *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 83, 523 N.E.2d 851 (Ohio 1988) ("the right to appeal is a property interest that cannot be denied without due process of law").

for Moldovan, the losing litigant, did not learn of an adverse judgment entered on July 9 until August 12, 1985, when the matter came up in conversation with opposing counsel. The only arguable notice to Moldovan was a notice published in a county legal newspaper; Moldovan's counsel lived in another county. Moldovan appealed on August 14, 36 days after judgment; the state Court of Appeals dismissed the appeal for lateness. The Ohio Supreme Court reversed, stating that failure of the trial court "to serve notice of its final appealable order on appellant or her attorney, whose names and addresses were known, frustrates the purposes of law and justice." 25 Ohio St.3d at 294, 496 N.E.2d at 467. "The opportunity to file a timely appeal pursuant to App. R. 4(A) is rendered meaningless when reasonable notice of an appealable order is not given." *Id.* Relying upon this Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *New York v. New York, N.H. & H. R.R. Co.*, 344 U.S. 293, 296 (1953), the court declared that notice by publication "does not constitute reasonable notice on a party whose name and address were known. The court concluded that the failure to give reasonable notice of final appealable orders violated the "due course of law" provision of the Ohio Constitution.[18]

The Ohio Court reaffirmed and explained the rule in *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 523 N.E.2d 851 (Ohio 1988). In that case, as in Fincher's, summary judgment was entered against a litigant (on

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[18] "It is well-established that every injured party 'shall have remedy by due course of law, and shall have justice administered without denial or delay.' Section 16, Article I, Ohio Constitution." *Moldovan*, 25 Ohio St. 3d at 295.

November 12, 1986), but no notice of the judgment was given until January 7, 1987. Atkinson filed an appeal after the normal appeal period had run. The opposing parties moved to dismiss the appeal, which motion was granted by the intermediate court of appeals. The Ohio Supreme Court reversed, reaffirming the rule of *Moldovan*. The court explained that "The hypothesis underlying any requirement of reasonable notice is that the right to appeal is a property interest that cannot be denied without due process of law." 37 Ohio St.3d at 83. "By developing a process of appellate review, states provide litigants with a property interest in the right to appeal. Clearly litigants cannot be deprived of this right without being granted due process of law." 37 Ohio St.3d at 85. "[P]rocedural due process places upon the government the duty to give reasonable notice, and an opportunity to be heard, to those whose interests in life, liberty of property are adversely affected by governmental action. Tribe, American Constitutional Law (2 Ed. 1988) 683, Section 10-8." 37 Ohio St.3d at 85.[19]

What *Hill v. Hawes* decided in 1944 as a matter of common sense and common law under the court rules,

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[19] Later cases recognize the continued vitality of the rule. *See Kertes Enterprises, Inc. v. Planning Zoning Commission of Orange Village*, 71 Ohio App.3d 151, 153, 593 N.E.2d 306, 307 (Ohio App. 1990) (absent notice of appealable order, dismissal of appeal "would deny appellant its right to appeal, without due process of law."); *Matter of Rowe*, 117 Ohio App.3d 215, 690 N.E.2d 89 (Ohio App. 1997) ("cursory attempt at service, resulting in no notice given at all", is not the notice constitutionally-required).

the Ohio Supreme Court decided in the 1980's in *Moldovan* and *Atkinson* as a matter of constitutional due process under its State Constitution, is what Due Process under the Federal Constitution demands in the year 2001.

OTHER DECISIONS HAVE RECOGNIZED THE DUE-PROCESS IMPLICATIONS OF THE FAILURE OF A COURT OR OTHER TRIBUNAL TO GIVE NOTICE OF ORDERS.

A number of other jurists have written – either explicitly or implicitly – of the due-process implications of a failure of a court or other quasi-judicial tribunal to serve notice of a final, appealable order upon the litigants. In *White Ash Mining Co. v. Burchett*, 916 F.2d 714 (table), 1990 U.S.App.LEXIS 18579, 1990 WL 159354 (6th Cir. 1990), the Benefits Review Board mailed its decision of November 30, 1988 to an incorrect address. As a result, White Ash did not learn of the decision under March 17, 1989, well past the 60-day period for filing a petition for review to the Sixth Circuit. A regulation specifically required the Board to give notice of its decisions. The Sixth Circuit refused to dismiss the appeal on grounds of untimeliness, stating:

> Where the Board, through its own neglect, fails to notify a party of an adverse decision, it would appear that elemental considerations of fairness and due process dictate that the party cannot be thus deprived of its right to appeal, and we so hold.

See also Bennett v. Lopeman, 598 F.Supp. 774, 782 (N.D. Ohio 1984) (striking down Ohio statute governing appellate review of unemployment benefits where claimant lost right of appeal due to non-receipt of notice of decision).

In *Nowsco Services Div., Big Three Industries v. Lassman*, 686 S.W.2d 197 (Tex.App. 1985), *writ ref'd n.r.e.*, the clerk of the intermediate appellate court failed to give notice of an order denying a motion for rehearing, and the time to seek review in the Texas Supreme Court expired. The court of appeals granted relief, stating:

> We find that loss of such a right was not occasioned by any mistake, neglect or fault on the part of Appellant or its attorney. We further find that Appellant will be greatly prejudiced and deprived of due process of law by the loss of his right to apply to the Supreme Court for a Writ of Error unless this court accepts the late filing of Appellant's Second Motion for Rehearing.

686 S.W.2d at 202. The Court noted that a provision of Texas law required the clerk of the appellate court to "mail or deliver" a copy of the Court's decision to counsel for the parties, and that "we believe the legislative intent was to prevent such an injustice as is presented to us in this case." *Id.*

Indeed, Alabama has recognized the constitutional unfairness inherent in a failure of the court to give proper notice. In *Ex Parte Weeks*, 611 So.2d 259 (Ala. 1992), Weeks was convicted of drunk driving in Alabama state district court. He filed an appeal to the circuit court. He called the county clerk's office several times to inquire when his appeal would be heard. After several such calls a court employee informed him "that there was no need in calling all the time" and that Weeks would be notified of his court date by letter. Several months later Weeks learned that the appeal had been dismissed for his failure to appear. He petitioned the Alabama Supreme Court, which granted a writ of mandamus directing the lower court to reinstate his appeal. The court observed that

procedural due process, as guaranteed under both the U.S. and state constitutions "contemplates the rudimentary requirements of fair play", and while the litigant has a duty to "follow the status of his case",

> a party's right to procedural due process is nonetheless violated if he is denied his day in court because the court, acting through its clerk, assumed the duty of notifying that party of his scheduled trial date and then negligently failed to do so.
>
> The circuit court's dismissal of Week's appeal, on the facts presented, lacked one of the fundamental attributes of a fair judicial proceeding . . . and could never be upheld where justice is fairly administered.

See also Kron v. Thelen, 178 Conn. 189, 423 A.2d 857 (Conn. 1979) (if right of appeal is to have any value, it must necessarily contemplate that the person who is to exercise the right be given the opportunity of knowing that there is a decision to appeal from and of forming an opinion as to whether that decision presents an appealable issue; if law is interpreted to avoid "the constitutional requirement of due notice to affected parties, then the power is placed in the hands of the Probate Court to nullify a party's right of appeal by its simple mistake or omission in notifying the parties of the entry of a decree."); *Storey v. Castner*, 306 A.2d 732, 734 n.2 (Del. 1973) (suggesting "the desirablity of reviewing the last sentence of its Rule 77(d) (providing that the Prothonotary's failure to notify the parties of the entry of an order or judgment does not affect appeal time) in the light of practicality and modern views of procedural due process.").

Other jurists have recognized the fundamental unfairness of a rule holding that a party's right to appeal may be lost regardless of whether the judicial branch complies with its statutory duty to give notice. Judge Higgenbotham wrote in his concurrence in *Hall v. Community Mental Health Center*, 772 F.2d 42, 46-47 (3d Cir. 1985):

> I write separately to note my view that *the current law on this issue seems totally inconsistent with basic concepts of justice and fairness*. . . . Where, as here, substantive rights are irretrievably lost because of the action of either the judge or the court staff, there is no remedy for the litigant, and a person who may have a most viable and valid claim can be forever denied relief because of the negligence of a clerk of court or a judge.
>
> Furthermore, the doctrine that lack of notice of a final judgment cannot affect the running of the time for appeal makes practically no sense in light of the way the real world actually functions.[20] We have created a ludicrous situation where the only way a litigant can protect himself would be to check all of the dockets of the court and make inquiries daily, and even then must rely, at his or her own peril, on information that may itself be erroneous. In a court with thousands of active cases on its docket, should

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20 "In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, 'its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.' " *Greene v. Lindsey*, 456 U.S. 444, 451 (1982) (citation omitted). *See also McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.").

> we require such burdensome measures? It would be an impossible burden for the vast majority of litigants whose lawyers do not have extensive staff to monitor the clerk's office and to catch clerical errors that may be made by either the court or the clerk's staff.

To similar effect, *see* Judge Jolly's special concurrence in *Wilson v. Atwood Group*, 702 F.2d 77, 80-81 (5th Cir. 1983)[21] (referring to the "unjustified harshness of the rigid application of a generally unknown and outmoded rule.").

CONCLUSION

In a cogent dissent in *Brendonwood Common v. Kahlenbeck*, 416 N.E.2d 1335, 1337-1339 (Ind.App. 1981), Indiana's Judge Sullivan criticizes the unfairness of a rule which leaves a violation of the legal duty to give notice remediless:

> Outmoded rules and procedures should not be blindly followed merely because they were comfortable and promotive of a relaxed and club-like practice of law in a bygone era. Lawyers no longer have the luxury of congregating on a daily, if not hourly, basis around the courthouse potbellied stove for purposes of information gathering and story swapping. Outmoded practices should not continue merely because 'things have always been done this way'. Those which are not efficient or promotive of competent legal representation should be discarded.

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[21] *Aff'd on reh'g en banc*, 725 F.2d 255 (5th Cir. 1984), *cert. dismissed*, 468 U.S. 1222 (1984).

As stated by Yates and Aston, JJ. in *Leach v. Three of the King's Messengers* (1765) 19 How. St. Tr. 1002, 1027:

> "No degree of antiquity can give sanction to a usage bad in itself."

416 N.E.2d at 1339. For the reasons set forth above, Petitioner Creighton E. Miller, Administrator for the Estate of Jabe J. Fincher, prays: (1) that the Court grant his petition and issue a Writ of Certiorari to the Supreme Court of Alabama, directing said tribunal to vacate its dismissal of his appeal and proceed to consider said appeal on the merits; (2) that the Court award Petitioner his costs and attorney's fees so wrongfully sustained; (3) that the Court grant such other, further and different relief as may be warranted in the premises.

DATED this 27th day of February, 2001 at Detroit, Michigan.

Respectfully submitted,

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Supreme Court of Alabama.

Creighton E. MILLER, as administrator of the Estate of Jabe J. Fincher, Sr., deceased

v.

AMERADA HESS CORPORATION et al.

No. 1990431.

Dec. 1, 2000.

MADDOX, Justice.

Creighton E. Miller, administrator of the estate of Jabe J. Fincher, Sr., deceased, sued several defendants, alleging that Fincher's death had resulted from his exposure to benzene and benzene-containing products while he was employed as a merchant mariner, by several employers, over a period of approximately 30 years. Miller stated claims against Fincher's employers, as well as against companies that had manufactured the benzene or the benzene-containing products to which Miller alleged Fincher had been exposed.

Two defendants, Keystone Tankship Corporation and Marine Transport Lines, Inc., jointly moved for a summary judgment. On June 5, 1997, the trial court granted their motion and entered a judgment in their favor. Because claims remained pending against other defendants, however, the trial court's June 5 order was not a final order and was not, therefore, appealable. See Rule 54(b), Ala.R.Civ.App. On August 12, 1999, the remaining defendants jointly moved for a summary judgment. The trial court granted their motion and entered the following order:

> "This matter is before the Court on the motion of defendants for summary judgment. On May 7, 1999, the Court granted Defendants' Motion to Exclude Expert Testimony. The Court is advised that plaintiff is unable to oppose the Motion for Summary Judgment without the expert testimony previously excluded by the Court. Accordingly, the Court is content that summary judgment is due to be, and hereby is GRANTED in favor of all remaining defendants as to each and every claim presented by plaintiff herein. Costs are taxed against plaintiff.
>
> "DONE this 24th day of September, 1999."

The case action summary sheet reflects that the trial court entered that order on September 24, and a notation made by the clerk of the court on the judge's written order indicates that it was filed at 11:49 a.m. on that same day.

The trial court's September 24 order was a final, appealable judgment because it resolved all of the plaintiff's claims. See Rule 54(b), Ala.R.Civ.App. Accordingly, to pursue an appeal, the plaintiff was required to file his notice of appeal with the circuit clerk within 42 days of September 24, 1999. Rule 4(a), Ala.R.App.P. The plaintiff did not do so. On November 11, 1999, after the 42 day period had expired, the plaintiff moved the trial court to extend the time to file an appeal. The trial court granted the plaintiff's motion, and the plaintiff filed his notice of appeal on November 15, 1999.

On January 4, 2000, the defendants filed a motion in this Court to dismiss the appeal on the basis that the trial

court had erred in granting the extension; that the extension was not effective; and, therefore, that the appeal was not timely filed. That motion was submitted, to be considered with the merits of the appeal.

Motion to Dismiss Appeal

Timeliness of an appeal is a jurisdictional matter, and an untimely appeal must be dismissed. Rule 2(a)(1), Ala.R.App.P. In *Bacon v. Winn-Dixie Montgomery, Inc.*, 730 So.2d 600 (Ala.1998), this Court was presented with a similar factual situation similar to the one here now. In that case, the plaintiff did not learn that the trial court had entered a summary judgment for the defendant until after the 42-day period for appealing had expired. In that case, this Court noted that "Rule 77(d) [, Ala.R.Civ.P.,] exclusively governs the situation in which a litigant claims that the clerk's office failed to notify her of the trial court's entry of a judgment." 730 So.2d at 602. Rule 77(d) provides:

> "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions."

In interpreting Rule 77(d), the Court in *Bacon* wrote:

> "The language of Rule 77(d) is clear. It involves a two-step process. Clerks are directed by Rule

> 77(d) to notify the parties by mail of the entry of a judgment. That language is not 'aspirational.' *See, Turner v. Barnes*, 687 So.2d 197 (Ala.1997). The Committee Comments to Rule 77(d), citing 7 Moore's Federal Practice, § 77.05 (2d ed.1971), state: 'The duty which [Rule 77(d)] imposes on the clerks and registers is intended for the convenience of litigants.' However, the language following that portion of Rule 77(d) imposing on the clerks and registers a duty to notify the parties of the entry of a judgment, by mail, clearly states that the failure of the clerk's office to fulfill that duty in no way affects the time to appeal unless a party can show excusable neglect. Adherence to this rule by the clerk or register should alleviate any notice problems; however, regardless of the failure of the clerk's office to fulfill its duty imposed by Rule 77(d), nothing in the plain language of Rule 77(d) or in existing caselaw relieves the party seeking an extension of time of the burden of showing 'excusable neglect' that caused the appeal not to be filed within the time ordinarily allowed. That is, when nothing can be shown beyond a party's simple reliance on the notification process of the clerk's office, the plain language of Rule 77(d) prohibits the granting of an extension of time within which to appeal."
>
> 730 So.2d at 602. (Some emphasis added.)

Given Rule 77(d) and its interpretation in *Bacon*, we must determine whether the plaintiff now before us has shown "beyond a . . . simple reliance on the notification process of the clerk's office." If not, then we must grant the defendants' motion to dismiss this appeal.

Plaintiff's lead counsel is from Detroit, Michigan. Lead counsel associated local counsel, who argued against the motion for summary judgment at the hearing the trial court held on September 24. The defendants argue that plaintiff's local counsel was present in the courtroom when the trial judge entered the judgment and thus that the plaintiff had notice of the judgment; the defendants have filed with their motion to dismiss the appeal an affidavit to that effect.[1] Plaintiff's local counsel, Larry C. Moorer, in a counter-affidavit, disputes the defendants' contention that he was present when the judgment was entered.[2]

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[1] In an affidavit by George M. Walker, attached to defendants' motion to dismiss the appeal, Walker states, in part, that the "[motion for summary judgment] was scheduled for oral argument on Friday, September 24, 1999, before trial judge Edward B. McDermott" and that "Judge McDermott heard argument that day and, at the conclusion of the argument, announced that defendants' Motion for Summary Judgment was granted." Walker further stated in the affidavit:

> "Local counsel for plaintiff, Larry C. Moorer, argued the motion for plaintiff and was present when Judge McDermott announced that he was granting the motion. Mr. Moorer was also present when I presented Judge McDermott in open court the proposed order which he signed that same day. There was no question in my mind, and there should not have been any question in the mind of anyone in the courtroom that morning, that Judge McDermott had granted defendants' Motion for Summary Judgment and that he had signed, or was going to sign that day, the order I presented to him confirming that."

[2] Moorer's affidavit, contained in a document filed in this Court and styled "APPELLANT'S CROSS MOTION TO STRIKE MATERIALS OUTSIDE THE RECORD, AND ALTERNATIVE

The record clearly shows that the judgment was entered on September 24. Plaintiff's local counsel, in his affidavit, stated that local practice, i.e., the practice in the Mobile Circuit Court, is for trial judges to place copies of orders or judgments in mailboxes maintained in the courthouse for local attorneys. He also stated that he

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CROSS MOTION TO REMAND FOR FURTHER FACTFINDING," states:

> "2. On Friday, September 24, 1999, I appeared before Judge McDermott in the Circuit Court and argued Plaintiff's position in opposition to Defendants' Motion for Summary Judgment. I recall waiting for some time in the courtroom before our case was called. I recall arguing the motion and that the argument was fairly brief, being only a few minutes long. Once the oral argument on the motion was over, I immediately left because I also had a hearing scheduled in Baldwin County that morning.
>
> 3. I have read the Motion to Dismiss and the Affidavit of George M. Walker, and I am aware that Defendants/Appellees claim that Judge McDermott actually granted summary judgment at the oral argument on the morning of September 24, 1999; that Mr. Walker presented an order granting summary judgment, and that Judge McDermott signed that order in my presence. I have no recollection of Judge McDermott stating that summary judgment was granted. Had an order been signed in my presence, the uniform practice was that I would have been given a copy of it." He further stated: "I never received notice of the entry of summary judgment until November 10, 1999, when I received a telephone call from the clerk's office concerning disposition of exhibits in the case." He further stated that what he alleged in his affidavit was the practice in the Mobile Circuit Court regarding distribution of orders of the court.

checked his courthouse mailbox nearly every day the courthouse was open and that he "never received any formal order or judgment . . . indicating that the motion for summary judgment had been ruled upon."

The plaintiff argues that, because local counsel regularly checked his mailbox in the courthouse, the plaintiff's failure to file a timely notice of appeal was the kind of "excusable neglect" contemplated by Rule 77(d), Ala.R.Civ.P. Consequently, he argues, this case is similar to *Turner v. Barnes*, 687 So.2d 197 (Ala.1997), and *Sparks v. Alabama Power Co.*, 679 So.2d 678 (Ala.1996).

Turner and *Sparks* are distinguishable, however. In *Turner* and *Sparks*, this Court noted that the Jefferson County circuit clerk's office followed a practice of entering information from case action summary sheets onto a computer system. In both cases, the appellants' attorneys had contacted personnel of the clerk's office and had been told by those representatives of the clerk's office, who apparently relied on incorrect information contained on the office's computer system, that no judgment had been entered. In *Sparks*, this Court held that "where there is a material discrepancy between the information contained on the formal case action summary sheet in a case and the information contained in the circuit clerk's computerized docket, a litigant should not be penalized [for] relying in good faith on the information contained in either 'document.' " *Sparks*, 679 So.2d at 681.

We believe the facts and circumstances of this case are more similar to those of *Bacon, supra*, than to those of *Turner* and *Sparks*. In *Bacon*, the trial had also granted an

extension of the time to file a notice of appeal; this Court stated:

> "*Winn-Dixie* maintains that even assuming, but not conceding, that *Bacon* did not receive timely notice of the judgment for *Winn Dixie*, she failed to demonstrate the 'excusable neglect' required by Rule 77(d) and/or failed to show that she had made the diligent effort it says is required by Rule 77(d) to learn whether the trial court had entered a judgment."

730 So.2d at 601. After stating that " Rule 77(d) exclusively governs the situation in which a litigant claims that the clerk's office failed to notify her of the trial court's entry of a judgment," this Court distinguished the *Sparks* case, as follows:

> "No evidence in the record indicates that Bacon's attorneys telephoned the clerk's office and were misinformed of the status of the case. *Sparks v. Alabama Power Co.*, 679 So.2d 678 (Ala.1996) (the Court declined to dismiss the appeal, where no notice of the denial of appellant's motion for a new trial was mailed to the appellant and her attorney had relied on computer-generated information provided by the clerk's office, information that differed from the information on the case action summary sheet)."

730 So.2d at 602-03. (Emphasis added.) In a footnote to the *Bacon* opinion, this Court stated:

> "Rule 77(d), Ala.R.Civ.P., is substantially similar to Rule 77(d), Fed.R.Civ.P. *See Wilson v. Atwood Group*, 725 F.2d 255, 257-58 (5th Cir.1984). *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054, 1056 (11th Cir.1986), quoting *In re Morrow*, 502 F.2d 520, 523 (5th Cir.1974); ' "[T]o permit an

> appeal where there is failure to notify, without more, would be opposed to the clear wording of Rule 77(d)." ' "
>
> 730 So.2d at 603 n. 3.

Even assuming that the plaintiff's counsel was not present in the courtroom when the trial court entered the judgment, we note that the record does not show that the plaintiff's counsel took action "beyond a . . . simple reliance on the notification process of the clerk's office" or court personnel, *Bacon*, 730 So.2d at 602. Thus, we conclude that *Sparks* and *Turner* are distinguishable from this case and that this case is more similar to *Bacon*. Accordingly, we conclude that the plaintiff did not show the kind of "excusable neglect" required by Rule 77(d). Thus, we grant the defendants' motion to dismiss the appeal. Because we dismiss the appeal, we do not discuss the merits of the appeal.

APPEAL DISMISSED.

HOOPER, C.J., and HOUSTON, SEE, LYONS, BROWN, JOHNSTONE, and ENGLAND, JJ., concur.

COOK, J., dissents.

COOK, Justice (dissenting).

Rule 77(d), Ala.R.Civ.P., provides that "upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions." The majority holds that the trial judge abused his discretion in extending the time in which to file a notice of

appeal in this case on the ground of "excusable neglect." I disagree; therefore, I respectfully dissent.

The majority concedes that the evidence indicates "the practice in the Mobile Circuit Court is for trial judges to place copies of orders or judgments in mailboxes maintained in the courthouse for local attorneys" and that no such copies were placed in the mailboxes until after the 42-day appeal period had expired. – So.2d at –. However, Rule 77(d) provides, in part:

> "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and who was not present in person or by that party's attorney or not otherwise notified, when such order or judgment was rendered, and make a note on the docket of the mailing."

(Emphasis added.) This language is not "aspirational." *Turner v. Barnes*, 687 So.2d 197, 198 (Ala.1997) (emphasis added).

Our Rules of Civil Procedure are to "be construed and administered to secure the just, speedy and inexpensive determination of every action." Ala.R.Civ.P. 1(c). "The dismissal of an appeal as untimely in a case in which the judiciary itself failed to follow the mandates of Rule 77(d) and thereby caused the untimeliness would not be 'just.' " *Etherton v. City of Homewood*, 700 So.2d 1374, 1378 (Ala.1997). "Indeed, it would be particularly repugnant, not only to the tenor of the rules, but also to justice, equity, and the integrity of the institution. It would be inequitable and unjust to hold a party strictly to

the provisions of Rule 77(d) if the judiciary itself does not comply with them." 700 So.2d at 1378 (emphasis added).

This case is essentially indistinguishable from *Brotherhood of Railway Carmen Division of Transportation Communications International Union v. Chicago & North Western Transportation Co.*, 964 F.2d 684 (7th Cir.1992).[3] In that case, an appealable judgment was entered on March 21, 1991, against Brotherhood of Railway Carmen ("BRC") in favor of Chicago & North Western Transportation Company ("CNW"). *Id.* at 685-86. "Neither party, however, received . . . notification from the district court clerk's office of a docket entry to [that] effect." *Id.* at 686. On April 30, 1991, BRC inquired about the status of the case and "was told that an order . . . had been entered on March 21." *Id.* When BRC moved to extend the time in which to file a notice of appeal, the trial court granted the motion.[4]

One of the issues on appeal was whether the trial court had abused its discretion in granting BRC's motion. *Id.* Specifically, "CNW contend[ed] that the failure of the Clerk to notify the parties of the entry of the March 21 order did not afford BRC 'excusable neglect' under

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[3] "Rule 77(d), Ala.R.Civ.P., is substantially similar to Rule 77(d), Fed.R.Civ.P." *Bacon v. Winn-Dixie Montgomery, Inc.*, 730 So.2d 600, 603 n. 3 (Ala.1998). Because "the Alabama Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure, federal decisions are highly persuasive when we are called upon to construe the Alabama rules." *City of Birmingham v. City of Fairfield*, 396 So.2d 692, 696 (Ala.1981).

[4] With a few exceptions, Fed.R.App.P. 4(a)(1)(A) requires that a notice of appeal be filed "within 30 days after the judgment or order appealed from is entered."

. . . the Federal Rules of Appellate Procedure." *Id.* The United States Court of Appeals for the Seventh Circuit disagreed with CNW, and explained:

> "BRC had been notified promptly upon the docketing of all the judge's prior orders. This pattern inexplicably stopped when the judge's dismissal order was entered. Thus, through no fault of its own, BRC failed to learn of the entry of the March 21 order. There is no contention that BRC did not act in good faith. Finally, great deference must be accorded a district court's finding of excusable neglect, given its more intimate awareness of the circumstances surrounding the lapse of the 30 day period."

Id. (Emphasis added.) *See also Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1563 (7th Cir.1990) ("deference" given trial court's finding of "excusable neglect"). This is the approach we should adopt in this case.

The majority, however, relies on *Bacon v. Winn Dixie Montgomery, Inc.*, 730 So.2d 600 (Ala.1998), in which I also dissented. The rule that proceeds from *Bacon* and this present case unduly burdens both the members of the bar and courthouse personnel. Under this rule, attorneys cannot rely on the notification system established by law or local rule. Consequently, they will be compelled to inquire in the clerk's office, or physically visit the trial judge's office, at regular intervals to determine the status of every pending case in which an appealable order may be entered. This procedure will add significantly to the duties of – among others – the trial judge's docket clerk.

The rule of these decisions is neither necessary nor practical. It will not "secure," but, rather, will impede, the

"just, speedy and inexpensive determination of every action." Rule 1(c). For these reasons, I respectfully dissent.

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER, ADMINISTRATOR OF THE ESTATE OF JABE J. FINCHER, SR., (D.O.D. 11/23/91)

Plaintiff,

vs.

KEYSTONE TANKSHIP CORPORATION, MARINE TRANSPORT LINES, INC., MATHIASEN TANKER IND., INC., NAUTILUS PETROLEUM CARRIERS CORP., SINCLAIR REFINING COMPANY, TEXACO, INC., *AND* ALLIED CHEMICAL CORP., AMERADA HESS CORP., AMERICAN PETROFINA CO. OF TEXAS, AMERICAN PETROFINA, INC., ARCO CHEM CO., ASHLAND OIL, INC., LEIGH VALLEY CHEMICAL CO., ATLANTIC RICHFIELD CO., ATLAS PROCESSING CO., BECKMAN INDUSTRIES, INC., BIOLOGICAL & FINE CHEMS DIV., BIOPRODUCTS DEPT., CHARTER INTERNATIONAL OIL CO., CITIES SERVICE CO., INC., N. AMERICAN PETRO. GP, COASTAL STATES GAS CORP., COASTAL STATES MARKETING, INC., COMMONWEALTH OIL REFINING CO., INC., COSDEN OIL & CHEMICAL CO., CROWN CENTRAL PETROLEUM CORP., DOW CHEMICAL, U.S.A., EXXON

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PACIFIC CO., AND CHEMPLIN *
PETROLEUM CO., *
*
Jointly and Severally, Defendants. *

COMPLAINT

NOW COMES PLAINTIFF through counsel undersigned and in declaring against the above-named Defendants, states as follows:

1. Plaintiff is the duly appointed administrator of the estate herein and brings this cause of action in behalf

of the estate above styled in the said representative capacity.

2. Jurisdiction and venue of the entitled cause lies within this jurisdiction for the reason that the maritime activity from which this lawsuit arises was in part carried on from port-to-port including waters within Mobile, Alabama; and many of the individual defendants have their principal place of business and/or do business within the jurisdiction of this Court. The amount in controversy exceeds the threshold jurisdictional amount.

3. This cause of action is brought under an Act of Congress popularly termed the Jones Act, 46 U.S.C. § 688 *et seq.*, as well as an action for unseaworthiness under the General Admiralty and Maritime Law wherein Plaintiff's Decedent at times relevant was a Merchant Mariner who served his employers aboard ships owned and operated by the said Shipowner-Defendants, which vessels carried benzene, benzene containing products and other hazardous products to which Plaintiff's Decedent was exposed to the detriment of his health.

4. On or about the entirety of his sea service career, Plaintiff's Decedent was required by his employers to perform duties which included the constant exposure to chemical carcinogens including benzene which caused a fatal health affliction in the form of blood cancer known as leukemia.

5. Plaintiff elects to maintain four causes of action, namely (1) negligence under the Jones Act, 46 U.S.C. § 688 *et seq.*; (2) breach of warranty of the Shipowner Defendants in failing to provide a reasonably seaworthy vessel of reasonably safe conditions for its employees

under the General Admiralty and Maritime Law; (3) a products liability action against manufacturers of benzene; and (4) actions for punitive damages.

6. As a direct and proximate result of the negligence under the Jones Act and the unseaworthiness of the vessels, Plaintiff's Decedent suffered from incurable cancer known as leukemia along with the sequelae thereof.

7. Plaintiff asserts a cause of action against manufacturers of benzene used in products to which Plaintiff's Decedent was exposed during his lifetime in a maritime setting and otherwise, which cause of action is predicated on the legal theory of products liability wherein benzene was an integral design of products to which Plaintiff's Decedent was exposed and thereby unfit for the purpose for which it was intended.

8. At all times relevant herein, Defendants designed, manufactured and marketed chemical carcinogens including benzene to which Plaintiff's Decedent was exposed during his lifetime; and Plaintiff's Decedent thereupon was exposed to benzene, along with other carcinogens and chemicals, which caused a fatal health affliction in the form of blood cancer known as leukemia.

9. Defendants, all of them, committed acts and omissions amounting to breach of implied warranty of fitness for safe use of the product of benzene, et al., failure to warn of dangers in exposure thereto and negligence in the design and manufacture of the chemical compositions.

10. The acts and omissions of the products liability Defendants account for gross negligence as well as willful, wanton and reckless conduct in the premises for placing a known carcinogen on the market when knowing that those to whom the product would be exposed were subject to contracting serious diseases such as leukemia with a failure to give warning of the dangers of exposure by human beings to the product, all of which constitutes the predicate for punitive and exemplary damages relief.

11. As a further cause of action, Plaintiff seeks exemplary and punitive damages for the reason that the said Shipowners willfully violated their duty to maintain safe and seaworthy vessels, with knowledge of unseaworthy conditions that existed at the time and place of the incidents complained of in this cause; and, the Shipowners committed acts and omissions that recklessly increased the danger to which Plaintiff's Decedent was put at the time that he was performing his work activities as a crewman; and, moreover, the Shipowners failed to maintain adequate safety devices and procedures, which failure rises to the level of willfulness and recklessness.

12. As a direct and proximate result of the acts and omissions aforestated by each of the defending parties herein, Plaintiff's Decedent sustained injuries as an indivisible, cumulative cause of each of the stated Defendants as contemplated in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951). Plaintiff seeks damages as below stated, *inter alia*:

a. Loss of earnings and earning capacity during Plaintiff's Decedent's lifetime;

b. Conscious pain and suffering;

c. Loss of support and guidance;

d. Loss of society and companionship suffered by the heirs and next of kin of Plaintiff's Decedent;

e. Exemplary and punitive damages;

f. Death by wrongful acts; and

g. Any and all other elements of damage cognizable in law which may be raised, pleaded and proved by the Plaintiff during the pendency of this cause and at the time of trial.

WHEREFORE, Plaintiff demands trial by jury and judgment against Defendants, jointly and severally, in an amount exceeding the threshold jurisdictional requirement or otherwise in figure in excess of One Hundred Thousand ($100,000.00) Dollars, to be more particularly calculated and adjusted upwards during the pendency of this cause; and Plaintiff demands punitive damages in an amount to be determined upon ascertaining the net worth of each Defendant herein; and Plaintiff further seeks interest, attorneys' fees and costs to be taxed in accordance with law, and such other and further measures of relief as the Court may determine to be appropriate and just in the premises.

Local Counsel for Plaintiff:

LARRY CHARLES MOORER
LAW OFFICES OF
LARRY CHARLES MOORER
2107 First National Bank Building
107 St. Francis Street
Mobile, AL 36602

-and-

THE JAQUES ADMIRALTY LAW FIRM, P.C.

BY: _____

LEONARD C. JAQUES
DONALD A. KRISPIN
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: November ___, 1994

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER, ADMINISTRATOR OF THE ESTATE OF JABE J. FINCHER, SR., (D.O.D. 11/23/91)

Plaintiff,

vs.

KEYSTONE TANKSHIP CORPORATION, MARINE TRANSPORT LINES, INC., MATHIASEN TANKER IND., INC., NAUTILUS PETROLEUM CARRIERS CORP., SINCLAIR REFINING COMPANY, TEXACO, INC., *AND* ALLIED CHEMICAL CORP., AMERADA HESS CORP., AMERICAN PETROFINA CO. OF TEXAS, AMERICAN PETROFINA, INC., ARCO CHEM CO., ASHLAND OIL, INC., LEIGH VALLEY CHEMICAL CO., ATLANTIC RICHFIELD CO., ATLAS PROCESSING CO., BECKMAN INDUSTRIES, INC., BIOLOGICAL & FINE CHEMS DIV., BIOPRODUCTS DEPT., CHARTER INTERNATIONAL OIL CO., CITIES SERVICE CO., INC., N. AMERICAN PETRO. GP, COASTAL STATES GAS CORP., COASTAL STATES MARKETING, INC., COMMONWEALTH OIL REFINING CO., INC., COSDEN OIL & CHEMICAL CO., CROWN CENTRAL PETROLEUM CORP., DOW

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PACIFIC CO., AND CHEMPLIN *
PETROLEUM CO., *
*
Jointly and Severally, Defendants. *

JURY DEMAND

Plaintiff herewith demands trial by jury of the above-entitled cause.

Local Counsel for Plaintiff:

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2107 First National Bank Building
107 St. Francis Street
Mobile, AL 36602

-and-

THE JAQUES ADMIRALTY LAW FIRM, P.C.

BY: _____
LEONARD C. JAQUES
DONALD A. KRISPIN
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: November ___, 1994

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER, ADMINISTRATOR OF THE ESTATE OF JABE J. FINCHER, SR., (D.O.D. 11/23/91)

Plaintiff,

vs.

KEYSTONE TANKSHIP CORPORATION, MARINE TRANSPORT LINES, INC., MATHIASEN TANKER IND., INC., NAUTILUS PETROLEUM CARRIERS CORP., SINCLAIR REFINING COMPANY, TEXACO, INC., *AND* ALLIED CHEMICAL CORP., AMERADA HESS CORP., AMERICAN PETROFINA CO. OF TEXAS, AMERICAN PETROFINA, INC., ARCO CHEM CO., ASHLAND OIL, INC., LEIGH VALLEY CHEMICAL CO., ATLANTIC RICHFIELD CO., ATLAS PROCESSING CO., BECKMAN INDUSTRIES, INC., BIOLOGICAL & FINE CHEMS DIV., BIOPRODUCTS DEPT., CHARTER INTERNATIONAL OIL CO., CITIES SERVICE CO., INC., N. AMERICAN PETRO. GP, COASTAL STATES GAS CORP., COASTAL STATES MARKETING, INC., COMMONWEALTH OIL REFINING CO., INC., COSDEN OIL & CHEMICAL CO., CROWN CENTRAL PETROLEUM CORP., DOW

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PACIFIC CO., AND CHEMPLIN *
PETROLEUM CO., *
*
Jointly and Severally, Defendants. *

WAIVER OF FILING FEE

The above-styled cause is a suit for the enforcement of laws enacted for the health and safety of seamen within the meaning of 28 U.S.C. § 1916, permitting the filing of the within cause without pre-payment of fees or costs or security therefor.

Local Counsel for Plaintiff:

LARRY CHARLES MOORER
LAW OFFICES OF
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107 St. Francis Street
Mobile, AL 36602

-and-

THE JAQUES ADMIRALTY LAW FIRM, P.C.

BY: _____
LEONARD C. JAQUES
Attorney for Plaintiff
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: November ___, 1994

(17)

TON E MILLER ETC VS KEYSTONE TANKSHIP CORP ET AL CV-1994-003907 EBM

Date	Page No. _____ ACTIONS (Continued) Case Number 2645
	ID YR NUMBER
3/5/99	Stipulation for Dismissal
	March 10, 1999 - Order - By order of Court, summary judgment granted as to defendan Canadian Oxy Offshore Production Co, Dow Chemical Company, Mobil Chemical Company, Mobil Oil Corporation and Phillips Petroleum Company, cause dismissed, each party to bear their own costs. with prejudice (WRITTEN ORDER) s/EBM
2-19-99	Deft., Dow Chemical Co's motion for summary judgment oral 3-26
	March 26, 1999 - Motion already granted 3/10/99
4/6/99	Defts motion to exclude opinion evidence of pltff's expert witnesses. oral 4-30
	May 7, 1999 - The defendants oral motion for the Court to reconsider the granting of their motion for summary judgment is denied. The defendants motion to exclude the opinions of plaintiff's experts is granted. The Court will grant a Rule 5(a) petition for appeal or will consider entering summary judgment if appropriate. EBM
5/6/99	Pltff's response to defts' motion to exclude opinion evidence of pltff's expert witnesses
5/12/99	Defts motion to supplement record on defts' moiton to exclude opinion evidence of pltff's expert witnesses
5/18/99	Pltff's motion to supplement record on defts' motion to exclude opinion evidence of ~~pltff's expert witnesses~~ May 27, 1999 - Motion Granted
5/19/99	Pltff's motion to certify for interlocutory appeal oral 6-18
	June 2, 1999 - By agreement of parties, granted.
	June 10, 1999 - Plaintff's motions tor econsider the entry of summary judgment in favor of the defendants, Keystone Tankship Corporation, and Marine Transport Lines, Inc are HEREBY DENIED. (WRITTEN ORDER)/s/Edward B. McDermott
6/22/99	Defts notice of filing of literature in supplementation of the record on motion to exclude expert testimony.
	June 23, 1999- By order of Court Materials returned to George Walker at Hand Arenda to be retined until needed.
	June 16, 1999 - CERTIFICATE OF TRIAL JUDGE OF APPEALABILITY OF ORDER NOT OTHERWISE APPELABLE: the order of May 7, 1999 involves a controlling question of law as to which there is a substantial ground for difference of opinion; that an immediate appeal from the order would materially advance the ultimate termination of the litigation; and an appeal would avoid protracted and expensive litigation. (WRITTEN ORDER)/s/Edward B. McDermott

App. 27

BEST AVAILABLE COPY

CREIGHTON MILLER ETC VS KEYSTONE TANKSHIP CORP ET AL Cv-94-3907

Date	Page No. 1 — ACTIONS (Continued) — Case Number ID YR NUMBER 2646
6/30/99	Defts notice of additional supplementation of the record on motion to exclude expert testimony.
7/6/99	Defts Second supplemental notice of supplementation of the record on motion to exclude testimony of Pltff's experts. *** Attachments to large for the file were returned to the defts atty George Walker for safe keeping until needed.***
8/12/99	Defts Motion for Court to enter summary judgment in defts favor as a matter of law based on the pleadings mailed 9-24 Sept. 24, 1999 - Order - By order of Court, summary judgment is granted in favor of all remaining defendants as to each and every claim presented by plaintiff herein. Costs are taxed against pltff. (WRITTEN ORDER) s/EBM
8/11/99	ORDER dated August 6, 1999 received this date from the Supreme Court: #1981521 Ex parte Creighton E. Miller as adm.of the estate of Jabe J.Fincer, deceased PETITION FOR PERMISSION TO APPEAL (In re: Creighton E. Miller as adm. of the estate of Jabe J. Fincer, deceased v. Keystone Tankship Corp. et al) IT IS ORDERED that the petition of Creighton E. Miller, as Administrator of the Estate of Jabe J. Fincer, deceased, for permission to appeal from the Interlocutory order entered in the above case is DENIED.
11/15/99	Notice of Appeal filed by Plaintiff to the Supreme Court from the September 24, 1999- Order granting defendants' motion for summary judgment. WRITTEN ORDER
11/15/99	$100.00 Docketing Fee
11/15/99	Security for Costs - Larry C. Moorer, Surety
11/15/99	Designation of Record on Appeal
11/15/99	Transcript Status
11/15/99	Certificate of Filing
11/15/99	Letter of Transmittal
	Docketing Statement
11/12/99	Pltff's motion to extend time to file appeal as of right. December 2, 1999 - Motion Granted. EBM
11/12/99	Defts response to motion to extend time to file appeal as of right.
12/13/99	Certificate of Completion of Record on Appeal by Trial Clerk.

App. 28

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff,

-v-

KEYSTONE TANKSHIP CORP. et al.,

Defendants.

PLAINTIFF'S MOTION TO EXTEND TIME TO FILE APPEAL AS OF RIGHT

NOW COMES PLAINTIFF, Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Deceased, through counsel undersigned, and respectfully moves the Court for an Order providing that Plaintiff shall file his Notice of Appeal from the Court's summary judgment apparently entered on September 24, 1999, on or before Monday, November 22, 1999. As further explained in the accompanying Brief, Plaintiff had no notice of the Court's ruling on the motion for summary judgment until Wednesday, November 10, 1999.

This Motion is brought pursuant to A.R.C.P. 77(d). For the reasons further articulated in the accompanying Brief, Plaintiff prays that his Motion be granted.

With this Motion Plaintiff lodges a proposed Order granting the relief requested.

RESPECTFULLY SUBMITTED,

By: _____

DONALD A. KRISPEN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

- and -

LARRY CHARLES MOORER
Local Counsel for Plaintiff
107 N. Jackson Street
Mobile, Alabama 36602

Dated: November 11, 1999

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff,

-v-

KEYSTONE TANKSHIP CORP. et al.,

Defendants. Civil Action No. CV-94-3907

BRIEF IN SUPPORT OF

PLAINTIFF'S MOTION TO EXTEND TIME
TO FILE APPEAL AS OF RIGHT

FACTS

Plaintiff brings the instant Motion due to the fact that he did not learn of the Court's entry of summary judgment until Wednesday, November 10, 1999 – five days after the normal 42-day period to appeal had expired.

The Court recalls that on May 7, 1999, it granted Defendant's motion to exclude the testimony of Plaintiff's expert witnesses. On June 2, 1999, this Court certified that ruling for an interlocutory appeal. Plaintiff immediately sought such interim review in the Alabama Supreme Court. However, the Supreme Court denied interlocutory review on August 6, 1999.

Defendants then moved for summary judgment. After receiving voluminous briefing and exhibits in support of, and opposition to, the motion for summary judgment, on September 24, 1999, the Court heard oral argument.

On Wednesday, November 10, 1999, Plaintiff's counsel received a telephone call from an employee of the Circuit Court, inquiring whether counsel wanted certain exhibits returned, as the Court was clearing out the file since the appeal period had allegedly expired. A number of telephone calls followed between Plaintiff's counsel and members of the Court staff. While the facts are not entirely clear, it appears that on September 24, the same day the motion was argued, the Court signed a written Order granting summary judgment and forwarded that Order to the Office of the Clerk of Court for filing and service upon counsel of record. That Order was never served upon counsel. (Plaintiff notes that on November 10, one of his Detroit counsel telephoned George Walker, Esq., lead counsel for the Defendants. Mr. Walker advised that no order had been entered, to his knowledge.)

Plaintiff's counsel were thunderstruck to hear on November 10 that an Order had been entered on September 24. The usual 42-day appeal period ran on November 5, 1999. A member of the Court's staff advised Plaintiff to submit a written statement of his position. Therefore, Plaintiff now brings this Motion to Extend Time to File Appeal as of Right.

LAW

There can be no question of Plaintiff's unswerving intent to appeal an adverse ruling, which has been apparent since at least June, when Plaintiff sought an interlocutory appeal.

Alabama Rule of Appellate Procedure 4(a)(1) provides in relevant part that

> in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure.

A.R.C.P. 77(d), in turn, requires that notice be given of the entry of orders or judgments.

The Rule provides in relevant part:

> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions.

In the present case, it appears that the Order in question simply "fell through the cracks", as sometimes

happens in any office which processes an enormous volume of documents. 'We do not live in a perfect world . . . ' *Direct Marketing Ass'n v. U.S. Postal Service*, 778 F.2d 96, 109 (2d Cir. 1985). Plaintiff would have timely filed an appeal had he known of the entry of the Order. The Court should exercise its discretion under Rule 77(d) and extend the time for Plaintiff to file his appeal papers to Monday, November 22, 1999.[1]

For the reasons set out above, Plaintiff respectfully requests that his Motion be granted.

RESPECTFULLY SUBMITTED,

BY: _____

DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

- and -

LARRY CHARLES MOORER
Local Counsel for Plaintiff
107 N. Jackson Street
Mobile, Alabama 36602

Dated: November 11, 1999

---

[1] The amount of time requested will permit Plaintiff to complete not only the Notice of Appeal proper, but also the Docketing Statement required by the Court Rules.

IN THE CIRCUIT COURT OF
MOBILE COUNTY ALABAMA

CREIGHTON MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,	§	
Plaintiff,	§	CIVIL ACTION NO. CV-94-3907
vs.	§	
KEYSTONE TANKSHIP CORPORATION, et al.,	§	
Defendants.	§	

RESPONSE TO FILE MOTION TO EXTEND TIME TO FILE APPEAL AS OF RIGHT

Defendants respond as follows to plaintiff's Motion to Extend Time to File Appeal as of Right:

1. The defendants' Motion for Summary Judgment was granted by the Court in open Court during motion docket on Friday, September 24, 1999, the day on which the motion was argued. Plaintiff's counsel was present in the courtroom at the time the Court announced its decision to grant summary judgment.

2. The written Order entering summary judgment was presented to the Court at the motion docket on September 24, 1999, by counsel for defendants, and was signed by the Court in the presence of counsel for plaintiff.

3. Because counsel for plaintiff was present at the time that the Court announced in open court its decision

to grant the Motion for Summary Judgment filed by defendants, and because plaintiff's counsel was present at the time the written Order was signed, this case does not present a situation under Rule 77(d) of the Alabama Rules of Civil Procedure that would authorize the Court to relieve a party for failure to appeal within the time allowed. As the committee comments to Rule 77(d) state:

> . . . the clerk need not notify those who received actual notice by being present or were otherwise notified when the order or judgment was entered.

WHEREFORE, defendants request that plaintiff's Motion to Extend Time to File Appeal as of Right be denied as a matter of law.

/s/ George M. Walker
GEORGE M. WALKER
Attorney No. WAL055

OF COUNSEL:

HAND ARENDALL, L.L.C.
3000 First National Bank Building
Post Office Box 123
Mobile, Alabama 36601
Phone: (334) 432-5511

LOUIS C. WOOLF

OF COUNSEL:

WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (615) 215-1000

Attorneys for Defendants:

Amerada Hess Corporation
Atlantic Richfield Company
Ashland Oil, Inc.
Amoco Corporation
Crown Central Petroleum Corporation
Exxon Corporation
Gulf Oil Corporation
Hess Oil Virgin Islands Corporation
Marathon Oil Company
Monsanto Company
Shell Oil Company
Sun Company, Inc. (R&M)
Texaco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, November 12, 1999, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

COUNSEL OF RECORD

Larry Charles Moorer, Esquire (Via Facsimile)
107 North Jackson Street
Mobile, Alabama 36602

Donald A. Krispin, Esquire (Via Facsimile)
The Jaques Admiralty Law Firm, P.C.
1370 Penobscot Building
Detroit, Michigan 48226

NOTICE OF APPEAL TO THE SUPREME COURT OF ALABAMA

Civil Action Number: CV-94-3907

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

APPELLANT: Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,

Plaintiff/Appellant

v.

APPELLEES: Amerada Hess Corporation
Amoco Corporation
Ashland Oil, Inc.
Atlantic Richfield Company
Crown Central Petroleum Corporation
Exxon Corporation
Gulf Oil Corporation
Hess Oil Virgin Islands Corporation
Marathon Oil Company
Monsanto Company
Shell Oil Company
Sun Company, Inc. (R&M)
Texaco, Inc.
Union Carbide Corporation

Defendants/Appellees.

TRIAL JUDGE: Hon. Edward B. McDermott, Circuit Judge

DATE OF JUDGMENT: September 24, 1999 (see Exhibit "A")

DATE OF POST-JUDGMENT ORDER: Motion to Extend Time to File Appeal as of Right still pending.

NOTICE IS HEREBY GIVEN that Plaintiff Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased, hereby appeals to the Supreme Court of Alabama from the Order of the Circuit Court for the County of Mobile granting summary judgment in favor of the Defendants. A copy of that Order is attached as Exhibit "A".

PROPER DESCRIPTION OF APPEALED CASE & APPROPRIATE COURT: Appeal to the Supreme Court. Summary judgment, amount claimed more than $50,000.

APPELLANT FILES WITH THIS NOTICE OF APPEAL:

1. Security for costs of appeal (see below)

Filed: _____
DATE

CERTIFIED AS A TRUE COPY:

_____
Circuit Clerk

_____
Larry C. Moorer
Attorney for Appellant
107 N. Jackson St.
Mobile, AL 36602
Telephone (334) 432-0002

SECURITY FOR COSTS

We hereby acknowledge ourselves security for costs of appeal. For the payment of all costs secured by this undertaking, we hereby waive our right of exemption as to personal property under the Constitution and laws of the State of Alabama.

Executed with our seals this ___ day of November, 1999.

Filed and approved: _____

_____	_____ (L.S.)
Circuit Clerk	**Larry C. Moorer/Surety**

DESIGNATION OF RECORD ON APPEAL

DESIGNATION OF CLERK'S RECORD: Appellant requests the clerk to include the following materials in the clerk's record:

DATE	DESCRIPTION OF DOCUMENT
___/___/_____	Complete trial court docket sheet
11/23/1994	Complaint
04/06/1999	Defts' motion to exclude opinion evidence of plaintiff's expert witnesses; Brief in Support of motion; & exhibits
05/06/1999	Pltff's response to defts' motion to exclude opinion evidence of pltff's expert witnesses & exhibits
05/07/1999	Docket entry granting Defts' motion to exclude opinion evidence of plaintiff's expert witnesses
05/18/1999	Plaintiff's motion to supplement the record on defts' motion to exclude opinion evidence of plaintiff's expert witnesses
05/27/1999	Docket entry granting Plaintiff's motion to supplement the record on defts' motion to exclude opinion evidence of plaintiff's expert witnesses

06/02/1999	Docket entry: pltf's motion to certify interlocutory appeal granted by agreement of the parties
08/06/1999	Order of Alabama Supreme Court denying interloc. appeal
08/12/1999	Defendants' Motion for Summary Judgment; Narrative Statement of Undisputed Facts and Brief in Support of Motion for Summary Judgment
09/22/1999	Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment & Exhibits
09/24/1999	Order granting summary judgment
11/11/1999	Plaintiff's Motion to extend time to file notice of appeal as of right; brief in support

TRANSCRIPT STATUS

Transcript will not be ordered. The case was dismissed prior to trial on a motion for summary judgment and underlying motion to exclude expert witnesses. Those motions were heard at unrecorded motion proceedings.

CERTIFICATE OF FILING

I certify that I have this date filed with the clerk of the trial court the original and 8 copies of the foregoing notice of appeal (along with $100 docket fee), and such other instruments as have been completed and included herein. A true copy of each of these items will be served by the clerk of the trial court on each of the following:

1) Clerk of the appellate court (the $100 docket fee shall be transmitted with this filing).

2) Court reporter (not applicable in the instant case)

3) Counsel for the appellees:

George M. Walker
Hand Arendall, L.L.C.
3000 First National Bank Building
Post Office Box 123
Mobile, AL 36601

Louis C. Woolf
Woolf, McLane, Bright, Allen & Carpenter
Post Office Box 900
Knoxville, TN 37901-0900

RESPECTFULLY SUBMITTED,

DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

-and-

Dated: November ___, 1999

BY: _____
LARRY CHARLES MOORER
Local Counsel for Plaintiff
107 N. Jackson Street
Mobile, Alabama 36602

THE JAQUES ADMIRALTY LAW FIRM

ATTORNEYS AND COUNSELORS AT LAW

MARITIME LAW ADVOCATES

[Names and Address Omitted In Printing]

November 12, 1999

VIA UPS OVERNIGHT DELIVERY

The Honorable Edward B. McDermott
Circuit Court Judge
Mobile County Circuit Court
109 Government Street
Mobile, Alabama 36601

RE: *Miller (Estate of Fincher) v. Keystone Tankship Corp./No. CV-94-3907*

Dear Judge McDermott:

I am writing to the Court to advise that as soon as possible, our local counsel, Mr. Moorer, will be filing a Notice of Appeal to the Alabama Supreme Court. This is not intended to have any effect on Plaintiff's pending motion asking the court to extend the time to file the appeal. Rather, Plaintiff wishes the record to be clear that once he had notice of the Court's September 24, 1999 summary judgment ruling, he acted quickly to assert his rights.

Very truly yours,

/s/ Donald A. Krispin
Donald A. Krispin

cc: All counsel of record

DOCKETING STATEMENT

Appeal to the Supreme Court of Alabama

Supreme Court Case Number:

County: Mobile • Civil Action No. CV-94-3907 • Hon. Edward B. McDermott, Trial Judge

I. PARTY FILING APPEAL (APPELLANT): Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased

APPELLANT'S ATTORNEYS:

Donald A. Krispin
The Jaques Admiralty Law Firm, P.C.
1370 Penobscot Building
Detroit, MI 48226
Telephone: 313.961.1080
Fax: 313.961.5275

- and -

Larry C. Moorer
107 North Jackson Street
Mobile, AL 36602
Telephone: 334.432.0002
Fax: 334.432.0040

II. PARTIES APPEALED AGAINST (APPELLEES):

	DATE DISMISSED
Allied Chemical Corp.	11/13/1995 (sub nom. Union Texas Prod Corp.)
American Petrofina Co. of Texas	11/13/1995 (sub nom. FINA, Inc.)
American Petrofina Inc.	11/13/1995 (sub nom. FINA, Inc.)

Arco Chem. Co.	09/27/1996
Amerada Hess Corporation	09/24/1999
Amoco Corporation	09/24/1999 (succ'r to Standard Oil Co. & Standard Oil Co. of Indiana)
Ashland Oil, Inc.[1]	09/24/1999
Atlantic Richfield Company	09/24/1999
Atlas Processing Co.	12/11/1995
Chemplin Petroleum Co.	11/13/1995 (sub nom. Union Pacific Resources Co.)
Coastal States Gas Corp.	11/13/1995
Coastal States Marketing Inc.	11/13/1995
Cosden Oil & Chemical Co.	11/13/1995 (sub. nom. FINA, Inc.)
Crown Central Petroleum Corporation	09/24/1999
Exxon Chemical Co.	09/24/1999
Exxon Co., U.S.A.	09/24/1999
Exxon Corporation	09/24/1999
Gulf Oil Chemicals Co.	09/24/1999
Gulf Oil Corporation	09/24/1999

[1] Named in the Complaint as Ashland Oil, Inc., Leigh Valley Chemical Co.

Hess Oil Virgin Islands Corporation	09/24/1999
Kerr-McGee Corp.	11/13/1995
Keystone Tankship Corp.	06/05/1997
Marathon Oil Company	09/24/1999
Marine Transport Lines, Inc.	06/05/1997
Monsanto Company	09/24/1999
Monsanto Polymers & Petrochems Co.	10/24/1997
Pennzoil Products Company	06/21/1996
Phillips P.R. Core Inc.	11/13/1995
Shell Chem Co. (Base Chems.)	09/24/1999
Shell Oil Company	09/24/1999
Sinclair Refining Company	09/24/1999 (sub nom. Atlantic Richfield Company)
Southwestern Refining Co. Inc.	11/13/1995
Standard Oil Co.	09/24/1999 (sub nom. Amoco)
Standard Oil Co. of Indiana	09/24/1999 (sub nom. Amoco)
Sun Company, Inc. (R&M)	09/24/1999
Sun Oil Co.	09/24/1999 (sub nom. Sun Oil Co., Inc. [R&M])

Sun Oil Co. of Pennsylvania	09/24/1999 (sub nom. Sun Oil Co., Inc. [R&M])
Suntide Refining Co.	09/24/1999 (sub nom. Sun Oil Co., Inc. [R&M])
Texaco, Inc.	09/24/1999
Union Carbide Corp.[2]	09/24/1999
Union Oil Co. of California	09/27/1996
Union Pacific Co.	11/13/1995 (sub nom. Union Pacific Resources Co.)

APPELLEES' ATTORNEYS:

George M. Walker, Esq.
Hand, Arendall, Bedsole, Greaves & Johnston
3000 First National Bank Bldg.
P. O. Box 123, Drawer C
Mobile, AL 36601
(334) 432-05511

Attorney for Allied Chemical Corp., Amerada Hess Corp., American Petrofina Co. of Texas, American Petrofina, Inc., Arco Chem. Co., Ashland Oil, Inc., Leigh Valley Chemical Co., Atlantic Richfield Co., Cotoes Service Co., Inc., N. American Petro. Gp,

---

[2] Named in the Complaint as Union Carbide Corp., Chems & Plastics Div.

Coastal States Gas Corp., Coastal States Marketing, Inc., Cosden Oil & Chemical Co., Crown Central Petroleum Corp., Dow Chemical, U.S.A., Exxon Chemical Co., Gulf Oil Chemicals Co., Gulf Oil Corp., Hess Oil Virgin Islands Corp., Kerr-McGee Corp. Southwestern Refining Co., Inc., Marathon Oil Co., Mobil Oil Corp., Mobil Chem. Co., Div. Petrochems Co., Monsanto Co., Monsanto Polymers & Petrochems. Co., Phillips Petro. Co., Phillips P.R. Core, Inc., Shell Chem Co. (Base Chems.), Sinclair Refining Company, Standard Oil Co., Standard Oil Co. of Indiana, Sun Oil Co. of Pennsylvania, Suntide Refining Co., Texaco, Inc., Union Carbide Corp. Chems & Plastics Div., Union Oil Co. of California, Union Pacific Co., Chemplin Petroleum Co.

Louis C. Woolf, Esq.
Woolf, McClane, Bright,
Allen & Carpenter
900 S. Gay St., Suite 2300
P. O. Box 2300
Knoxville, TN 37901
(423) 215-1000

Attorney for Allied Chemical Corp., Amerada Hess Corp., American Petrofina Co. of Texas, American Petrofina, Inc., Arco Chem. Co., Ashland Oil, Inc., Leigh Valley Chemical Co., Atlantic Richfield Co., Cotoes Service Co., Inc., N. American Petro. Gp, Coastal States Gas Corp., Coastal States Marketing, Inc., Cosden Oil & Chemical Co., Crown Central Petroleum Corp., Dow Chemical, U.S.A., Exxon Chemical Co., Gulf Oil Chemicals Co., Gulf Oil Corp., Hess Oil Virgin Islands Corp., Kerr-McGee Corp. Southwestern Refining Co., Inc., Marathon Oil Co., Mobil Oil Corp., Mobil Chem. Co., Div. Petrochems Co., Monsanto Co., Monsanto Polymers & Petrochems. Co., Phillips Petro. Co., Phillips P.R. Core, Inc., Shell Chem Co. (Base Chems.), Sinclair Refining Company, Standard Oil Co., Standard Oil Co. of Indiana, Sun Oil Co. of Pennsylvania, Suntide Refining Co., Texaco, Inc.,

Union Carbide Corp. Chems & Plastics Div., Union Oil Co. of California, Union Pacific Co., Chemplin Petroleum Co.

Gregory C. Buffalow, Esq.
Miller, Hamilton, Snider & Odom, LLC
Post Office Box 46
Mobile, AL 36601
(334) 432-1414

Attorney for Keystone Tankship Corp., Marine Transport Lines, Inc.

III. APPELLANT IS THE TRIAL COURT: Plaintiff.

IV. IS THIS A CROSS APPEAL? No.

V. RELIEF AWARDED/REQUESTED:

A. Monetary damages were either sought or awarded, as set out below:

1. Compensatory damages were:

(b) not awarded, but sought in the amount of "in excess of One Hundred Thousand ($100,000.00) Dollars".

2. Punitive Damages were:

(c) sought, but not awarded - amount sought was not specified in the complaint.

3. Not applicable.

4. Not applicable.

5. Was there a remittitur or additur at issue in the trial court? No.

B. Not applicable.

C. Not applicable.

VI. TYPE OF JUDGMENT OR ORDER APPEALED.

F. Summary Judgment (several interlocutory orders)

G. Dismissal orders (in the nature of summary judgments)

VII. IF THE CASE WENT TO TRIAL, HOW MANY DAYS DID THE TRIAL TAKE? There was no trial.

VIII. FINALITY OF JUDGMENT OR ORDER APPEALED. Date of entry of judgment or order appealed from: September 24, 1999. This final order brings up for review all interlocutory orders.

1. Is the judgment or order appealed from in compliance with Rule 58, A.R.Civ.P.?

YES.

2. Does the order appealed from constitute a disposition of all claims as to all parties?

YES.

3. If not, did the trial court enter an order intended to make the order final pursuant to Rule 54(b)?

Not applicable.

4. If the trial court intended to make the order appealed from final pursuant to Rule 54(b), did the trial

court in the Rule 54(b) order expressly determine that there was no just reason for delay and expressly direct that final judgment be entered?

Not applicable.

5. If the answer to question 2 is "NO," and the trial court did not make the order final by full compliance with Rule 54(b), please explain the basis for seeking appellate review and cite the authority for this appeal:

Not applicable.

IX. POST-JUDGMENT MOTIONS: List all post-judgment motions by date of filing, type and date of disposition (whether by trial court order or by the provisions of Rule 59.1, A.R.Civ.P.):

DATE OF FILING: November 12, 1999

TYPE OF POST-JUDGMENT MOTION: Plaintiff's Motion to Extend Time to File Appeal as of Right (pursuant to A.R.Civ.P. 77(d)).

DATE OF DISPOSITION: Under advisement with the Circuit Court.

X. CONSTITUTIONAL ISSUES:

1. Are the provisions of Rule 44, A.R.App.P., applicable to this appeal? No.

2. Not applicable.

XI. NATURE OF CASE ON APPEAL:

Category that best describes the appeal:

11 Wrongful Death

Secondary theories applicable to the suit:

29 Admiralty/maritime law, toxic-tort/shipboard benzene exposure

XII. APPELLATE REVIEW: "Please take notice that your case may be initially reviewed by the Court of Civil Appeals. Pursuant to § 12-2-7, Code of Alabama 1975, the Supreme Court has the authority to transfer any civil case within its jurisdiction to the Court of Civil Appeals, except cases presenting a substantial question of federal or state constitutional law; cases involving a novel legal question, the resolution of which will have significant statewide impact [and other specific categories which do not apply to this case] . . . "

"If you believe this case should not be transferred to the Court of Civil Appeals, please state with specificity the reason(s) why it should *not* be transferred, referring to pertinent sections of § 12-2-7. Reasons should be supported in the ISSUES and FACTS sections of this docketing statement."

RESPONSE: The instant *Fincher* case is a companion case to another case presently on appeal to this Court: *Creighton E. Miller, Administrator of the Estate of Matthew Williams, Deceased (Plaintiff/Appellant), v. ARCO Marine, Inc., et al. (Defendants/Appellees) ("Williams")*, Docket No. 1981819. The *Fincher* and *Williams* appeals should be heard together. While no two cases are exactly alike, the

similarities between the two cases in question are striking, in that both are:

- wrongful death actions arising under federal maritime tort law;

- concern a decedent's shipboard exposure to benzene and other toxins while working as a merchant mariner;

- As a consequence of such benzene exposure decedent developed a form of cancer from which he perished. (Jabe Fincher died from acute myelogenous leukemia (AML), while Matthew Williams died from multiple myeloma, or MML.)

- Same attorneys involved in both cases.

- Both cases were before the same trial judge (The Honorable Edward B. McDermott), who treated them as companion cases, although he never formally consolidated them.

- Plaintiff named the same expert witnesses to testify in both cases.

- Trial court excluded Plaintiff's opinion testimony in both cases based on a finding that they failed to pass muster under the *Frye* standard of "general acceptance."

- In both cases, trial court then granted summary judgment based upon Plaintiff's inability to meet his burden of proof without the excluded expert testimony.

XIII. ISSUES: Briefly summarize the issues on appeal.

(1) Whether the trial court committed reversible error in granting Defendants' various motions for dismissal or summary judgment? (2) Whether the trial court erred in its apparent conclusion that plaintiff had proffered insufficient evidence of decedent Jabe Fincher's exposure to benzene and other toxins to withstand entry of summary judgment? (3) Whether the trial court erred in its conclusion that the proffered expert testimony did not pass muster under the *Frye* Rule as applied in Alabama? (4) Whether the trial court committed reversible error in failing to conduct a *Frye* hearing?

XIV. FACTS: Without argument, briefly summarize the facts to inform the court of the nature of the case.

Decedent Jabe J. Fincher, Senior, was a merchant mariner. In a career spanning the years 1942 to 1970 he sailed aboard vessels owned and operated by the several shipowner-defendants. Those vessels carried benzene, benzene-containing products and other hazardous products. As part and parcel of his shipboard duties, Fincher was required to perform tasks which entailed exposure to benzene and other toxins. As a consequence of this shipboard exposure, Fincher developed a blood cancer known as acute myelogenous leukemia (AML), from which he died on November 23, 1991.

Creighton E. Miller was appointed administrator for the Estate of Jabe Fincher. Miller timely brought suit in the Circuit Court for Mobile County, claiming against the Defendants under the governing federal maritime tort

law. Plaintiff sought recovery against the shipowners under the Jones Act and the General Maritime Law doctrine of unseaworthiness. Plaintiff claimed against the products defendants under products liability law as incorporated into the General Maritime Law. The pretrial discovery process produced abundant deposition testimony from crewmates showing that Decedent was exposed to benzene and other toxins during his shipboard career. Plaintiff also named several experts who opined that Decedent's exposure to benzene and other toxins caused the multiple myeloma from which he eventually perished.

Throughout the litigation the Court dismissed various Defendants piecemeal in various interlocutory orders based upon Plaintiff's alleged failure to present sufficient evidence of Decedent Jabe Fincher's shipboard exposure to their benzene-containing products. Trial between Plaintiff and the remaining Defendants was scheduled for May, 1999. In April, 1999, the remaining Defendants moved to exclude the testimony of Plaintiff's experts, arguing (1) that the proffered opinions did not pass muster under the *Frye* doctrine; (2) that Plaintiff had failed to proffer sufficient evidence of Fincher's shipboard exposure to benzene. Without holding a *Frye* Hearing, the trial court on May 7, 1999 granted the motion to exclude the expert testimony. On Plaintiff's motion the trial court promptly certified this ruling for interlocutory appeal. On August 6, 1999, this Court denied Estate of Fincher's petition for permission to take an interlocutory appeal (Docket No. 1981521). In the wake of that ruling, the remaining Defendants moved the trial court for summary judgment. On September 24, 1999, the trial court

signed an Order granting summary judgment and dismissing all remaining claims. That Order was never served upon Plaintiff's counsel, who did not learn of the Order until November 10, 1999. Upon learning of the issuance of the Order, Plaintiff promptly filed a motion with the trial court pursuant to A.R.Civ.P. 77(d), asking that court to extend the time to file his Notice of Appeal. (That Motion remains under advisement with the trial court as of the date this Docketing Statement is prepared.)

RESPECTFULLY SUBMITTED,

BY: _____

DONALD A. KRISPIN
The Jaques Admiralty
Law Firm, P.C.
Attorneys for Plaintiff/Appellant
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

-and-

BY: _____

LARRY CHARLES MOORER
Local Counsel for
Plaintiff/Appellant
107 North Jackson Street
Mobile, Alabama 36602

Dated:
December ___, 1999

IN THE SUPREME COURT OF ALABAMA

CREIGHTON MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,	§	SUPREME COURT NO. 1990431
Plaintiff/Appellant,	§	Circuit Court of Mobile County Civil Action No. CV-94-3907
vs.	§	
AMERADA HESS CORPORATION, et al.,	§	
Defendants/Appellees	§	

MOTION TO DISMISS APPEAL

Amerada Hess Corporation, et al., the Appellees in this matter, move this Court, pursuant to Rules (2)(a)(1) and 27(a) of the *Alabama Rules of Appellate Procedure*, to dismiss the above-styled appeal filed by Appellant Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., deceased.

In support of said motion, Appellees would show unto the Court as follows:

1. Appellant appeals from a summary judgment entered in favor of Appellees on September 24, 1999, by the Honorable Edward B. McDermott, Circuit Judge, Mobile County, Alabama.

2. Appellant's appeal is due to be dismissed as **untimely** because Appellant did not file his Notice of Appeal until November 15, 1999, beyond the running of the 42-day period allowed for appeals.

3. The law in Alabama is clear that a failure to timely file the Notice of Appeal is jurisdictional. *Hayden v. Harris*, 437 So. 2d 1283, 1287 (Ala. 1983). Therefore, Appellant's untimely appeal is due to be dismissed.

4. On November 11, 1999, Appellant filed a Motion to Extend Time to File Appeal pursuant to Rule 77(d) of the *Alabama Rules of Civil Procedure*. On December 2, 1999, the trial court granted Appellant's motion. As will be addressed more fully below, the trial court's grant of Appellant's motion was an abuse of discretion, and as such, did not operate to extend Appellant's time for appeal beyond the normal 42-day period.

5. Appellant's Motion to Extend Time to File Appeal was based **solely** on the fact that the Clerk of Court failed to give Appellant's counsel notice of the trial court's Order granting Appellees' Motion for Summary Judgment on September 24, 1999. (Exhibit A). The trial court granted Appellees' Motion for Summary Judgment during motion docket on Friday, September 24, 1999, the day on which the motion was argued. Appellant's counsel was present in the courtroom at the time the court announced its decision to grant summary judgment. The written Order entering summary judgment was presented to the court at motion docket on September 24, 1999 by counsel for Appellees, and was signed by the trial judge in the presence of counsel for Appellant. Appellant had actual notice on September 24, 1999 that Appellees' Motion for Summary Judgment had been granted. (See Affidavit of George M. Walker, attached hereto as Exhibit B).

6. The Alabama Supreme Court has explained the burden of proof for obtaining a Rule 77(d) extension of appeal time as follows:

> . . . [R]egardless of the failure of the clerk's office to fulfill its duty imposed by Rule 77(d), nothing in the plain language of Rule 77(d) or in existing case law relieves the party seeking an extension of time of the burden of showing "excusable neglect" that caused the appeal not to be filed within the time ordinarily allowed. That is, **when nothing can be shown beyond a party's simple reliance on the notification process of the clerk's office, the plain language of Rule 77(d) prohibits the granting of an extension of time within which to appeal.**

Bacon v. Winn-Dixie Montgomery, Inc., 730 So. 2d 600, 602 (Ala, 1998) (emphasis added).

7. The trial court abused its discretion in granting Appellant's Motion to Extend Time to File Appeal because Appellant failed to show "excusable neglect" as required by Rule 77(d). Appellant could make no showing of "excusable neglect" because Appellant's counsel was present at the time the court announced its decision to grant Appellees' Motion for Summary Judgment, and because Appellant's counsel was present when the written Order was signed.

8. "The intent of Rule 77(d), Ala. R. Civ. P., was to allow an out-of-time appeal where fault for the untimely appeal does not lie with the party seeking to appeal." *Greystone Close v. Fidelity and Guar. Ins. Co.*, 664 So. 2d 900, 902 (Ala. 1995). Appellant is the party at fault for failing to file a timely Notice of Appeal in this case. Appellant's

attempt to use the clerk's failure to notify as justification for an extension of appeal time is clearly misguided. The committee comments to Rule 77(d) state:

> . . . the clerk need not notify those who received actual notice by being present or were otherwise notified when the order or judgment was entered.

Appellant had full notice of the trial court's Order in this case; regardless, the trial court abused its discretion in granting Appellant's Motion to Extend Time to File Appeal because Appellant did not make the required showing of "excusable neglect."

9. The Alabama Supreme Court in *Bacon v. Winn-Dixie Montgomery, Inc.*, 730 So. 2d 600, 602 (Ala. 1998), dismissed an appeal as untimely because the Appellant failed to make the requisite showing of excusable neglect under Rule 77(d). The court explained that counsel has a duty to act diligently and keep abreast of the status of his case by checking with the clerk's office. *See* id. at 602. The court found that because Bacon's counsel did not provide evidence that he made an effort to follow the status of the case, and because the case action summary sheet showed that Winn-Dixie's summary judgment was entered on February 6, 1998, Bacon failed to make the requisite showing of "excusable neglect." *Id.* The court, in dismissing the appeal as untimely, summarized the situation as follows:

> . . . Assuming that, as the case action summary sheet suggests, the clerk's office failed to notify Bacon of the judgment entered for Winn-Dixie, that failure is regrettable. Nevertheless, because the record does not show that Bacon made the

> requisite showing of "excusable neglect," we must dismiss the appeal as having been untimely filed.

Id. at 603.

10. Because Appellant's Motion to Extend Time to Appeal was based solely on the fact that Appellant failed to receive notice from the clerk (Exhibit A), and because the case action summary sheet from the clerk's office clearly shows that summary judgment was entered in favor of Appellees on September 24, 1999 (Exhibit C), the trial court abused its discretion in granting Appellant's motion.

11. Rule 77(d) of the *Alabama Rules of Civil Procedure* is substantially similar to Rule 77(d) of the *Federal Rules of Civil Procedure. See Wilson v. Atwood Group*, 725 F.2d 255, 257-58 (5th Cir. 1984). In interpreting Rule 77(d) of the *Federal Rules of Civil Procedure*, the Eleventh Circuit has noted the following: " '[T]o permit an appeal where there is failure to notify, without more, would be opposed to the clear wording and intent of Rule 77(d).' " *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054, 1056 (11th Cir. 1986) (quoting *In Re Morrow*, 502 F.2d 520, 523 (5th Cir. 1974)).

WHEREFORE, Appellees respectfully request the Court find that the Appellant's appeal is untimely and dismiss said appeal, with prejudice.

Respectfully submitted this 30th day of December, 1999.

/s/ George M. Walker
GEORGE M. WALKER
Attorney No. WAL055

OF COUNSEL:

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LOUIS C. WOOLF
M. DENISE MORETZ

OF COUNSEL:

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Attorneys for Defendants/Appellees:

Amerada Hess Corporation
Atlantic Richfield Company
Ashland Oil, Inc.
Amoco Corporation
Crown Central Petroleum Corporation
Exxon Corporation
Gulf Oil Corporation
Hess Oil Virgin Islands Corporation
Marathon Oil Company
Monsanto Company
Shell Oil Company
Sun Company, Inc. (R&M)
Texaco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, December 30, 1999, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

COUNSEL OF RECORD

Larry Charles Moorer, Esquire
107 North Jackson Street
Mobile, Alabama 36602

Donald A. Krispin, Esquire
The Jaques Admiralty Law Firm, P.C.
1370 Penobscot Building
Detroit, Michigan 48226

Thomas S. Rue, Esquire
Johnstone, Adams, Bailey, Gordon & Harris, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633

EXHIBIT A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff,

-v-

KEYSTONE TANKSHIP CORP. et al.,

Defendants. **Civil Action No. CV-94-3907**

PLAINTIFF'S MOTION TO EXTEND TIME TO FILE APPEAL AS OF RIGHT

NOW COMES PLAINTIFF, Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Deceased, through counsel undersigned, and respectfully moves the Court for an Order providing that Plaintiff shall file his Notice of Appeal from the Court's summary judgment apparently entered on September 24, 1999, on or before Monday, November 22, 1999. As further explained in the accompanying Brief, Plaintiff had no notice of the Court's ruling on the motion for summary judgment until Wednesday, November 10, 1999.

This Motion is brought pursuant to A.R.C.P. 77(d). For the reasons further articulated in the accompanying Brief, Plaintiff prays that his Motion be granted.

With this Motion Plaintiff lodges a proposed Order granting the relief requested.

RESPECTFULLY SUBMITTED,

BY: /s/ Donald A. Krispin
DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

– and –

LARRY CHARLES MOORER
Local Counsel for Plaintiff
107 N. Jackson Street
Mobile, Alabama 36602

Dated: November 11, 1999

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff,

-v-

KEYSTONE TANKSHIP CORP. et al.,

Defendants. Civil Action No. CV-94-3907

BRIEF IN SUPPORT OF

PLAINTIFF'S MOTION TO EXTEND TIME
TO FILE APPEAL AS OF RIGHT

FACTS

Plaintiff brings the instant Motion due to the fact that he did not learn of the Court's entry of summary judgment until Wednesday, November 10, 1999 – five days after the normal 42-day period to appeal had expired.

The Court recalls that on May 7, 1999, it granted Defendant's motion to exclude the testimony of Plaintiff's expert witnesses. On June 2, 1999, this Court certified that ruling for an interlocutory appeal. Plaintiff immediately sought such interim review in the Alabama Supreme Court. However, the Supreme Court denied interlocutory review on August 6, 1999. Defendants then moved for summary judgment. After receiving voluminous briefing and exhibits in support of, and opposition to, the motion

for summary judgment, on September 24, 1999, the Court heard oral argument.

On Wednesday, November 10, 1999, Plaintiff's counsel received a telephone call from an employee of the Circuit Court, inquiring whether counsel wanted certain exhibits returned, as the Court was clearing out the file since the appeal period had allegedly expired. A number of telephone calls followed between Plaintiff's counsel and members of the Court staff. While the facts are not entirely clear, it appears that on September 24, the same day the motion was argued, the Court signed a written Order granting summary judgment and forwarded that Order to the Office of the Clerk of Court for filing and service upon counsel of record. That Order was never served upon counsel. (Plaintiff notes that on November 10, one of his Detroit counsel telephoned George Walker, Esq., lead counsel for the Defendants. Mr. Walker advised that no order had been entered, to his knowledge.)

Plaintiff's counsel were thunderstruck to hear on November 10 that an Order had been entered on September 24. The usual 42-day appeal period ran on November 5, 1999. A member of the Court's staff advised Plaintiff to submit a written statement of his position. Therefore, Plaintiff now brings this Motion to Extend Time to File Appeal as of Right.

LAW

There can be no question of Plaintiff's unswerving intent to appeal an adverse ruling, which has been apparent since at least June, when Plaintiff sought an interlocutory appeal.

Alabama Rule of Appellate Procedure 4(a)(1) provides in relevant part that

> in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure.

A.R.C.P. 77(d), in turn, requires that notice be given of the entry of orders or judgments. The Rule provides in relevant part:

> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions.

In the present case, it appears that the Order in question simply "fell through the cracks", as sometimes happens in any office which processes an enormous volume of documents. 'We do not live in a perfect world . . .' *Direct Marketing Assn v. U.S. Postal Service*, 778 F.2d 96, 109 (2d Cir. 1985). Plaintiff would have timely filed an appeal had he known of the entry of the Order. The Court should exercise its discretion under Rule 77(d) and

extend the time for Plaintiff to file his appeal papers to Monday, November 22, 1999.[1]

For the reasons set out above, Plaintiff respectfully requests that his Motion be granted.

RESPECTFULLY SUBMITTED,

BY: /s/ Donald A. Krispin
DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

– and –

LARRY CHARLES MOORER
Local Counsel for Plaintiff
107 N. Jackson Street
Mobile, Alabama 36602

Dated: November 11, 1999

---

[1] The amount of time requested will permit Plaintiff to complete not only the Notice of Appeal proper, but also the Docketing Statement required by the Court Rules.

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,	:	CASE NUMBER
Plaintiff,	:	CV 94-3907
vs.	:	
KEYSTONE TANKSHIP CORPORATION, et al.,	:	
Defendants.	:	

PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and says that on the 11th day of November, 1999, she served Plaintiff's Motion to Extend Time to File Appeal as of Right, Brief in Support, proposed Order and a copy of this Proof of Service, via facsimile and by regular mail, upon the following counsel of record:

George M. Walker, Esq.
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3000 First National Bank Bldg.
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(334) 432-5511

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Petroleum Corp., Dow Chemical, U.S.A., Exxon Chemical Co., Gulf Oil Chemicals Co., Gulf Oil Corp., Hess Oil Virgin Islands Corp., Kerr-McGee Corp., Southwestern Refining Co., Inc., Marathon Oil Co., Mobil Oil Corp., Mobile Chem. Co., Div. Petrochems Co., Monsanto Co., Monsanto Polymers & Petrochems. Co., Phillips Petro. Co., Phillips P.R. Core, Inc., Shell Chem Co. (Base Chems.), Sinclair Refining Company, Standard Oil Co., Standard Oil Co. of Indiana, Sun Oil Co. of Pennsylvania, Suntide Refining Co., Texaco, Inc., Union Carbide Corp. Chems & Plastics Div., Union Oil Co. of California, Union Pacific Co., Chemplin Petroleum Co.

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Coastal States Marketing, Inc., Cosden Oil & Chemical Co., Crown Central Petroleum Corp., Dow Chemical, U.S.A., Exxon Chemical Co., Gulf Oil Chemicals Co., Gulf Oil Corp., Hess Oil Virgin Islands Corp., Kerr-McGee Corp., Southwestern Refining Co., Inc., Marathon Oil Co., Mobil Oil Corp., Mobile Chem. Co., Div. Petrochems Co., Monsanto Co., Monsanto Polymers & Petrochems. Co., Phillips Petro. Co., Phillips P.R. Core, Inc., Shell Chem Co. (Base Chems.), Sinclair Refining Company, Standard Oil Co., Standard Oil Co. of Indiana, Sun Oil Co. of Pennsylvania, Suntide Refining Co., Texaco, Inc., Union Carbide Corp. Chems & Plastics Div., Union Oil Co. of California, Union Pacific Co., Chemplin Petroleum Co.

Gregory C. Buffalow, Esq.
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254 State Street
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(334) 439-7586
(334) 433-1001

Attorney for Keystone Tankship Corp., Marine Transport Lines, Inc.

/s/ Eileen M. Chmielewski
EILEEN M. CHMIELEWSKI

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff,

-v-

KEYSTONE TANKSHIP CORP. et al.,

Defendants. Civil Action No. CV-94-3907

ORDER

GRANTING PLAINTIFF'S MOTION
TO EXTEND TIME TO FILE APPEAL AS OF RIGHT

This cause is before the Court on Plaintiff's Motion to Extend Time to File Appeal as of Right. Good cause appearing, IT IS ORDERED that the Motion is GRANTED.

Plaintiff shall file his Notice of Appeal on or before Monday, November 22, 1999.

DONE this ___ day of November, 1999.

HON. EDWARD B. MCDERMOTT
CIRCUIT COURT JUDGE

EXHIBIT B

STATE OF ALABAMA:
COUNTY OF MOBILE:

AFFIDAVIT OF GEORGE M. WALKER

Personally appeared before me, the undersigned authority in and for said State and County, George M. Walker, who, under oath, did depose and say as follows:

My name is George M. Walker and I am above the age of nineteen (19) years and I make this affidavit on my own personal knowledge. I am one of counsel of record for the defendants in *Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased v. Amerada Hess Corporation, et al.*, Civil Action No. CV-94-3907, in the Circuit Court of Mobile County, Alabama.

On August 12, 1999, I filed a Motion for Summary Judgment, supported by a Narrative Statement of Undisputed Facts and a brief in support of the Motion for Summary Judgment. The single premise of the Motion for Summary Judgment was that, because the trial court had granted defendants' Motion to Exclude Opinion Evidence of Plaintiff's Expert Witnesses, and because plaintiff had no other evidence in support of his contentions against these defendants, these defendants were thereby entitled to summary judgment as a matter of law.

The motion was scheduled for oral argument on Friday, September 24, 1999, before trial judge Edward B. McDermott. Judge McDermott heard argument that day and, at the conclusion of the argument, announced that defendants' Motion for Summary Judgment was granted. Local counsel for plaintiff, Larry C. Moorer, argued the

motion for plaintiff, and was present when Judge McDermott announced that he was granting the motion. Mr. Moorer was also present when I presented Judge McDermott in open court the proposed order which he signed that same day. There was no question in my mind, and there should not have been any question in the mind of anyone in the courtroom that morning, that Judge McDermott had granted defendants' Motion for Summary Judgment and that he had signed, or was going to sign that day, the order I presented to him confirming that.

The docket sheet reflects that the motion was granted that day, and that a written order was entered to that effect that same day. The only way anyone could have been unaware of the granting of the Motion for Summary Judgment and the existence of the written order would have been to have wholly ignored the proceedings in court that morning, and to have wholly ignored the docket sheet.

Further affiant sayeth not.

/s/ George M. Walker
GEORGE M. WALKER

Subscribed and sworn to
before me this 30th day of
December, 1999.

/s/ Mary K. Boback
Notary Public, State at Large

My commission Expires:
MARY K BOBACK
NOTARY PUBLIC
ALABAMA [ILLEGIBLE]
[MY COMMISSION EXPIRES 1-22-2003] (SEAL)

EXHIBIT C

CREIGHTON MILLER ETC VS KEYSTONE TANKSHIP CORP ET AL Cv-94-3907

Page No. _____ **Case Number**

ID YR NUMBER

Date **ACTIONS (Continued)**

?/30/99 Defts notice of additional supplementation of the record on motion to exclude expert testimony.

?/6/99 Defts Second supplemental notice of supplementation of the record on motion to exclude testimony of Pltff's experts.

*** Attachments to large for the file were returned to the defts atty George Walker for safe keeping until needed.***

8/12/99 Defts Motion for Court to enter summary judgment in defts favor as a matter of law based on the pleadings oral 9-24

Sept. 24, 1999 – Order – By order of Court, summary judgment is granted in favor of all remaining defendants as to each and every claim presented by plaintiff herein. Costs are taxed against pltff.

(WRITTEN ORDER) s/EBN

8/11/99 ORDER dated August 6, 1999 received this date from the Supreme Court: #1981521 Ex parte Creighton E. Miller as adm. of the estate of Jabe J. Fincer, deceased PETITION FOR PERMISSION TO APPEAL (In re: Creighton E. Miller as adm. of the estate of Jabe J. Fincer, deceased v. Keystone Tankship Corp. et al)

IT IS ORDERED that the petition of Creighton E. Miller, as Administrator of the Estate of Jabe J. Fincer, deceased, for permission to appeal from the Interlocutory order entered in the above case is DENIED..

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV-94-3907, Mobile County)

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff/Appellant,

-v-

ALLIED CHEMICAL CORP. et al.,

Defendants/Appellees.

APPELLANT'S MOTION TO EXTEND BRIEFING SCHEDULE PENDING COMPLETION OF THE RECORD ON APPEAL, AND FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS APPEAL

NOW COMES PLAINTIFF/APPELLANT, Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased, through counsel undersigned, and moves the Court to extend the current briefing schedule for a period of 14 days until the record on appeal can be completed. The Clerk's Record as received and reviewed by counsel is lacking numerous, crucial evidence and pleadings necessary to properly present Plaintiff-Appellant's appeal to this Court.

The briefing schedule presently in effect calls for the filing and service of Appellant's opening brief on appeal

by January 10, 2000. Appellant asks the Court to extend this deadline to January 24, 2000, by which time he is hopeful that the supplemental record can be prepared and the proper citations inserted into the opening brief.

Appellant further moves for additional seven (7) days to respond to the Appellees' Motion to Dismiss Appeal, which counsel did not receive until January 3, 2000. The response is presently due on January 6, 2000. Appellant prays for an extension to January 13, 2000 to file his brief in response to the motion to dismiss.

For the reasons further presented in the Brief submitted in support of this Motion, Plaintiff-Appellant prays that his Motion be granted.

RESPECTFULLY SUBMITTED,

BY: _____

DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff/Appellant
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

- and -

LARRY CHARLES MOORER
Local Counsel for Plaintiff/ Appellant
107 North Jackson Street
Mobile, Alabama 36602

Dated: January 4, 2000

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV-94-3907, Mobile County)

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,
Plaintiff/Appellant,
-v-

ALLIED CHEMICAL CORP. et al.,

Defendants/Appellees.

BRIEF IN SUPPORT OF:

APPELLANT'S MOTION TO EXTEND BRIEFING SCHEDULE PENDING COMPLETION OF THE RECORD ON APPEAL, AND FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS APPEAL

The Initial Clerk's Record on Appeal Omits Crucial Documents Designated for Inclusion.

This case is an appeal from various interlocutory evidentiary rulings, dismissals and summary judgments entered by the Mobile County Circuit Court. Those various rulings became final with the trial court's issuance of a summary judgment Order on September 24, 1999. However, that Order was never served upon counsel, and counsel first learned of the Order on November 10, 1999

via telephone call from the Clerk of the trial court advising that the file was being closed. The regular appeal period had run, and Plaintiff on November 12, 1999 filed a Motion to Extend Time to File Appeal as of Right. On November 15, 1999, Plaintiff filed his Notice of Appeal to this Court (Exhibit "A"). That Notice of Appeal contained an initial Designation of Record on Appeal which designated a set of documents filed by Plaintiff on or about September 22, 1999, namely "Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment & *Exhibits*".

On December 2, 1999, the trial court granted the motion to extend to time for appeal. With this assurance that the appeal would actually go forward, on December 16, 1999, Plaintiff-Appellant filed with the trial court a Supplemental Designation of Record on Appeal (Exhibit "B"). The Supplemental Designation principally addressed parts of the record relating to interlocutory dismissals of various defendants prior to September of 1999.

The briefing on Estate of Fincher's appeal is being prepared out of the office of Fincher's Detroit counsel. Work on the appeal has proceeded on the assumption that the Clerk's Record would contain the documents designated, and that upon receipt of the record the proper record references ("C.___") could simply be plugged in.

However, the Clerk's Record in its present state is lacking vital documents. The Record contains the Plaintiff's September, 1999 brief in opposition to the motion for summary judgment, *but none of the crucial exhibits have been included*. Those exhibits (at least 59 in number)

include complete copies of the many depositions taken from Decedent Fincher's crewmates, testifying to the toxic vapor exposures aboard the vessels Fincher sailed; depositions from the plaintiff's expert witnesses; scientific studies, among other things.[1] Appellant cannot properly argue his case without reference to these materials.

Moreover, the Clerk's Record does not contain *any* of the materials mentioned in the Supplemental Designation. Appellant cannot properly argue his case for reversal of the trial court's various dismissals and summary judgments which occurred prior to September of 1999 without reference to these materials.

On Tuesday, January 4, 2000, counsel undersigned dispatched to the trial court via overnight delivery service a Motion to Supplement the Record to include the missing materials.

Appellant Respectfully Requests An Additional Seven Days to Respond to the Just-Received Motion to Dismiss Appeal.

On December 30, 1999, in the midst of the winter holidays, the Appellees sent counsel undersigned a Motion to Dismiss Appeal by regular mail. That Motion argues that the trial judge abused his discretion in extending the time to appeal pursuant to Rule of Civil Procedure 77(d).

---

[1] Counsel notes that the initial record on appeal in the related case of *Creighton E. Miller as Adm'r of the Estate of Matthew Williams* (Supreme Court Docket No. 1981819), contained similar omissions.

The Motion was not received by counsel undersigned until January 3, 2000. Under ARAP 27(a), Appellant's response to the motion is due "within 7 days (1 week) after service of the motion". However, "the court may . . . extend the time for responding to any motion." Unless extended, Appellant must respond to the Motion to Dismiss by Thursday, January 6, 2000, which means that the response must be complete and dispatched via overnight carrier by January 5 – *just two days after the Motion was received.* Counsel cannot properly respond in just two days to this request for the ultimate sanction of dismissal. While a staff attorney for the Court advises that it would not be inappropriate to respond to the Motion in the principal brief on appeal, Appellant requests an additional seven days to prepare, serve and file his response to the Motion to Dismiss.[2]

CONCLUSION

For the reasons set out above, Appellant respectfully prays:

(1) That the Court grant him a 14-day extension to January 24, 2000 for completion of a supplemental record on appeal and completion of Appellant's brief on appeal;

---

[2] On January 4, 2000, the Court's staff attorney advised that the Motion to Dismiss does not yet appear on the Court's docket sheet.

(2) That the Court grant him a 7-day extension of time to respond to the Motion to Dismiss Appeal.

RESPECTFULLY SUBMITTED,

BY: _____

DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff/Appellant
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

- and -

LARRY CHARLES MOORER
Local Counsel for Plaintiff/Appellant
107 North Jackson Street
Mobile, Alabama 36602

Dated: January 4, 2000

EXHIBIT A:

Plaintiff's Motion to Extend Time to File appeal as of Right

[Reproduced at Pages 65 to 74]

EXHIBIT B:

Supplemental Designation of Record on Appeal

[Omitted]

EXHIBIT A

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased, Plaintiff,	§	CIVIL ACTION NO. CV-94-3907
vs.	§	
KEYSTONE TANKSHIP CORPORATION, et al., Defendants.	§	

ORDER

(Filed on Sep. 24, 1999)

This matter is before the Court on the motion of defendants for summary judgment. On May 7, 1999, the Court granted Defendants' Motion to Exclude Expert Testimony. The Court is advised that plaintiff is unable to

oppose the Motion for Summary Judgment without the expert testimony previously excluded by the Court. Accordingly, the Court is content that summary judgment is due to be, and is hereby GRANTED in favor of all remaining defendants as to each and every claim presented by plaintiff herein. Costs are taxed against plaintiff.

DONE this 24th day of ~~August~~ September, 1999.

/s/ Edward B. McDermott
CIRCUIT JUDGE

LETTER OF TRANSMITTAL OF NOTICE OF APPEAL TO APPELLATE CLERK BY TRIAL CLERK

State of Alabama
Unified Judicial System
Form ARAP-2 2/92

Appellate Case Number
2654

IN THE CIRCUIT COURT OF Mobile, **COUNTY**

APPELLANT Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr. Deceased

Appellees Con't: Sun Company, Inc. (R&M), Texaco, Inc. and Union Carbide Corporation

v. APPELLEE Amerada Hess Corporation, Amoco Corporation, Ashland Oil, Inc., Atlantic Rich Company, Crown Central Petroleum Corporation, Exxon Corporation, Gulf Oil Corporation, Hess Oil Virgin Islands Corporation, Marathon Oil Company, Monsanto Company, Shell Oil Company

Civil Action Number	Date of Judgment	Date of Post-Judgment Order
CV94003907	September 24, 1999	

Written notice of appeal has been filed on the date indicated hereon (within 42 days from the entry of judgment or post-judgment order). Notice of appeal filed 11/15/99

A certified copy of the written notice of appeal is forwarded herewith for filing with the Clerk of the (Supreme) Court ~~(of Civil Appeals)~~ along with the $100 docket fee.

I certify that I have served a copy of this letter of transmittal along with a copy of the notice of appeal on each of the following:

~~1. Court Reporter~~

2. **Appellant's Counsel** The Jaques Admiralty Law Firm, P.C. Mr. Donald A. Krispin, Attorney At Law, 1370 Penobscot Building, Detroit, Michigan 48226 Phone: (313) 961-1080 and Mr. Larry C.Moorer, Attorney At Law, 107 N. Jackson Street Mobile, Al. 36602 Phone: (334) 432-0002

3. **Appellee's Counsel** Messrs. Hand, Arendall, Bedsole, Greaves & Johnston, Mr. George M. Walker, Attorney At Law, 3000 First National Bank Bldg. P.O. Box 123,

Drawer C. Mobile, Al.
36601 Phone: ([Illegible])
432-5511. [Illegible]

DATED this 15th day of November, 1999.

/s/ Susan F. Wilson
Circuit Clerk

APPELLEES COUNSEL CONTINUED:

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CERTIFICATE OF COMPLETION OF RECORD ON APPEAL BY TRIAL CLERK

State of Alabama
Unified Judicial System
Form ARAP-6 9/92

Appellate Case Number
2655

TO THE CLERK OF THE: [XX] **SUPREME COURT OF ALABAMA**

[ ] **COURT OF CIVIL APPEALS OF ALABAMA**

DATE OF NOTICE OF APPEAL: November 15, 1999

APPELLANT Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr. Deceased

v. APPELLEE Amerada Hess Corporation, Amoco Corporation, Ashland Oil, Inc., Atlantic Richfield Company, Crown Central Petroleum Corporation, Exxon Corporation, Gulf Oil Corp., Hess Oil Virgin Islands Corporation, Marathon Oil Co., Monsanto Co., Shell Oil Co., Sun Co. Inc. (R&M), Texaco, Inc., and Union Carbide Corporation

I certify that I have this date completed the record on appeal by assembling in ~~(a single volume of ___ pages)~~ (Thirteen volumes of 200 pages each and one volume of 55 pages) the clerk's record and the reporter's transcript and that the record on appeal will be made available to the parties for the preparation of briefs.

I certify that a copy of this certificate will this date be served on counsel for each party[1] to the appeal.

DATED this 13th day of December, 1999.

/s/ Susan F. Wilson
Circuit Clerk

Mobile
County

(Amended October 1, 1991.)

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[1] *Counsel for appellant is reminded that the appellant's brief is due to be filed with the clerk of the appellate court within 28 days from the date of this certificate.*

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV-94-3907, Mobile County)

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff/Appellant,

-*v*-

AMERADA HESS CORP. et al.,

Defendants/Appellees.

APPELLANT'S BRIEF

IN OPPOSITION TO MOTION TO DISMISS APPEAL

– and –

IN SUPPORT OF CROSS-MOTION TO STRIKE MATERIALS OUTSIDE THE RECORD, AND ALTERNATIVE CROSS-MOTION TO REMAND FOR FURTHER FACTFINDING

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Attorneys for Plaintiff-Appellant

NOW COMES PLAINTIFF/APPELLANT, Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased, through counsel undersigned, and presents his brief which will serve as a response in opposition to the Motion to Dismiss Appeal dated December 30, 1999.

This brief is also submitted in support of Appellant's Cross-Motion to Strike Materials Outside the Record namely, the Affidavit of George M. Walker dated December 30, 1999, as well as Appellant's Alternative Cross-Motion to Remand for Further Factfinding. Without waiving the objection to presentation of materials outside the record, Appellant presents the counter-affidavits of his local counsel Larry C. Moorer, his lead counsel from Detroit, Donald A. Krispin, and associate Detroit counsel, J. Kelly Carley.[1] This Brief is further supported by Exhibits 1-9.

THE COURT SHOULD STRIKE OR DISREGARD THE AFFIDAVIT OF GEORGE M. WALKER. IN THE ALTERNATIVE, THE COURT SHOULD REMAND THIS CAUSE FOR FURTHER FACTFINDING.

In their Motion to Dismiss Appeal, the Appellees ask the Court to review the decision of the Circuit Court granting an extension of time to appeal and to find an abuse of discretion. In support of the Motion, Appellees seek to present the Affidavit of George M. Walker, one of their attorneys. Estate of Fincher objects and moves to

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[1] Mr. Krispin is presently in Houston, Texas, trying an asbestos-exposure case styled *James v. Salierno v. Foster Wheeler Company* before the Honorable J. Dale Wainright in the State District Court for Harris County, Texas. Mr. Krispin executed his Affidavit before a notary in Houston and faxed it to Detroit where this Brief was being prepared. Appellant submits a copy of the faxed affidavit and will file the original with the Court as soon as it is received from Mr. Krispin. Similarly, Mr. Moorer faxed a notarized copy of his Affidavit which is submitted with this Brief. Mr. Moorer will forward the original Affidavit to the Court.

strike the Walker Affidavit for a most fundamental reason: that Affidavit was never presented to the trial court and thus forms no part of the record properly reviewable by this appellate court. The *only* document properly part of the record on this issue is the Response to Motion to Extend Time to File Appeal as of Right, filed in the trial court on November 12, 1999 (Exhibit 7 to this Brief).

The case law, both in Alabama and other jurisdictions, is clear that such unilateral supplementation of the record is improper. In *Coleman v. Taber*, 572 So.2d 399, 401 (Ala. 1990), this Court rejected an invitation to "look beyond the record . . . . This Court is bound by the record . . . " Similarly, in *TranSouth Financial Corp. v. Bell*, 739 So.2d 1110, 1114 (Ala. 1999), this Court refused to consider an affidavit not properly part of the record.

Cases from the federal courts agree. In *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 859 (3d Cir. 1994), the Court remarked, "An appellate court always decides a case on the record before it; it cannot do otherwise." In *Dayton Hudson Corp. v. Cardinal Industries, Inc.*, 1996 U.S.Dist.LEXIS 13875 (N.D.Ill.1996), the Court noted that "This Court is not bound to accept a party's version of the facts (or the party's own spin on the contents of the record) unless the record accurately reflects the same. In short, the record is king."

Without waiving this objection, Estate of Fincher – faced with the opposing parties' unilateral submission of an affidavit not "of record" – felt it incumbent to present counter-affidavits from attorneys Moorer, Krispin and Carley. (To do otherwise was to suggest that Fincher had no response to the untrue version of the facts presented

by Appellees.) However, Estate of Fincher contends that consideration of evidence and resolution of factual disputes is not a task in the first instance for this appellate court. As stated in *Goland v. Central Intelligence Agency*, 607 F.2d 339, 371 (D.C.Cir.1978):

> An appellate court has no fact-finding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination. Fact-finding and the creation of a record are the functions of the district court[.]

Rather, this Court reviews factual findings made by a trial and reverses only where such findings are clearly erroneous. Ala.R.Civ.P. 52(a).

The Affidavits of Moorer, Krispin, Carley and Walker reveal a sharp factual dispute concerning what transpired at the unrecorded September 24, 1999, hearing on the motion for summary judgment. Judge McDermott apparently resolved such disputes in Appellant's favor *sub silentio* in his December 2, 1999, margin order granting the motion for extension of time to appeal (Exhibit 9). The facts of the case – the failure of the clerk to give notice of the Summary Judgment Order, counsel's diligence in checking on the status of the case – were known to the trial court. To the extent this Court believes that specific findings should be spread on the record concerning these facts, the Court should remand to the Circuit Court with directions to engage in further factfinding by considering the Affidavits and other relevant evidence.

Etherton v. City of Homewood, 700 So.2d 1374 (Ala. 1997), supports Appellant's contention that further fact-finding may be in order before the timeliness of the

appeal is ripe for resolution by this Court. In *Etherton*, the appellants sought to validate a belatedly filed notice of appeal, claiming – as does Estate of Fincher in this case – that they had not received notice of the ruling in question, and that their counsel had been diligent in following the status of their case. However, the trial court had never passed upon those factual assertions. This Court refused to entertain the factual assertions as a matter of first impression, stating that "appellate courts of this state scrupulously avoid assuming a fact-finding role" (700 So.2d at 1378). Observing that the assertions in the materials filed for the first time on appeal were "factual and fact-specific, thus requiring findings by the trial court", this Court remanded for further factfinding. This Court directed the trial court to allow Plaintiffs to present their arguments and for the trial court to make "findings of fact regarding the validity of their allegations".[2]

A similar procedure was followed in *Vianello v. Pacifico*, 905 F.2d 699 (3d Cir. 1990) (remanded to trial court for further consideration of motion for extension of time to appeal).

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[2] On remand, the trial court granted an extension of time pursuant to Rule 77(d), and this Court heard the appeal on the merits, and in its very recent (September 10, 1999) decision noted simply that there was no abuse of discretion in allowing the extension, and that "This case is now, therefore, correctly postured for review." *Etherton v. City of Homewood*, 741 So.2d 1078 (Ala. 1999).

CHRONOLOGY OF RELEVANT EVENTS

Without waiving the objections expressed above, Appellant sets forth what he believes are facts not genuinely in dispute, followed by a discussion of the facts recounted in the various Affidavits which are, or which may be, in dispute.

Statement of Undisputed Facts

Appellant believes that the following facts are not in dispute:

1. Following protracted pretrial proceedings – more than four years – the trial court set the matter for jury trial to commence on May 17, 1999.

2. On or about April 12, 1999, Defendants brought Motion to Exclude Opinion Evidence of Plaintiff's Expert Witnesses.

3. Estate of Fincher opposed the Motion and filed a Response to Defendants' Motion to Exclude Opinion Evidence of Plaintiff's Expert Witnesses.

4. Oral argument on the motion to exclude was held on May 7, 1999.

5. At the end of the brief hearing the trial court took the matter under advisement and later that day issued its terse Docket Entry granting the motion to exclude Plaintiff's expert witnesses. The Docket Entry also stated that "The Court will grant a Rule 5(a) petition for appeal or will consider entering summary judgment if appropriate."

6. Plaintiff promptly made a motion for the trial court to certify the matter under Rule 5(a) for an interlocutory appeal.

7. The trial court granted the motion and certified the matter for interlocutory appeal on June 2, 1999.

8. Pursuant to the trial court's certification, Plaintiff filed a petition for permission to take an interlocutory appeal to this Court.

9. Appellees registered no opposition whatsoever to the petition for permission to appeal.

10. On August 6, 1999, this Court denied the petition for interlocutory appeal.

11. On August 12, 1999, the Appellees moved the trial court for summary judgment (Carley Aff. ¶ 3).

12. On September 9, 1999, counsel for Appellees asked Estate of Fincher to stipulate to entry of summary judgment (Exhibit 1 and Carley Aff. ¶ 4).

13. On September 10, 1999, Estate of Fincher declined the offer (Exhibit 2 and Carley Aff. ¶ 4).

14. The motion for summary judgment was calendared for oral argument before Judge McDermott along with a number of other motions for the morning of Friday, September 24, 1999 (Exhibit 3; Carley Aff. ¶ 5).

15. At the September 24 oral argument, Estate of Fincher's local counsel, Larry C. Moorer, Esq. appeared and argued Plaintiff-Appellant's position on the motion. George M. Walker, Esq. appeared and argued the motion on behalf of the appellees.

16. On November 12, 1999, Plaintiff filed a Motion to Extend Time to File Appeal as of Right, Brief in support of said motion; accompanied by proof of service and a proposed order granting the motion (Exhibit 5).

17. On November 12, 1999, Appellees filed a 2-page Response to Motion to Extend Time to File Appeal as of Right and Certificate of Service (Exhibit 7). There was no affidavit submitted with this Response, and said Response is the only matter in the trial court record concerning the timeliness of this appeal.

18. On November 12, 1999, Mr. Krispin, Estate of Fincher's lead counsel in Detroit, wrote to Judge McDermott explaining that Plaintiff would not wait for the trial court's ruling on the motion for extension of time, but would file his notice of appeal as soon as possible (Exhibit 6).

19. On November 15, 1999, Plaintiff filed his Notice of Appeal with the trial court (Exhibit 8).

20. On December 30, 1999, counsel for appellees mailed appellant's counsel a Motion to Dismiss Appeal by regular mail.

21. This Court granted Appellant an extension of time to Thursday, January 13, 2000, to respond to the Motion to Dismiss Appeal.

Statement of Facts Which Are, or Which May Be, Disputed.

The following is a summary of the most important facts shown by the Affidavit, which are, or may be, in dispute.

Judge McDermott Did Not Enter a Summary Judgment Order in Local Counsel's Presence. The Affidavit of Larry C. Moorer, Estate of Fincher's local counsel, states:

> 2. On Friday, September 24, 1999, I appeared before Judge McDermott in the Circuit Court and argued Plaintiff's position in opposition to Defendants' Motion for Summary Judgment. I recall waiting for some time in the courtroom before our case was called. I recall arguing the motion, and that the argument was fairly brief, being only a few minutes long. Once the oral argument on the motion was over, I immediately left because I also had a hearing scheduled in Baldwin County that morning.
>
> 3. I have read the Motion to Dismiss and the Affidavit of George M. Walker, and I am aware that the Defendant-Appellees claim that Judge McDermott actually granted summary judgment at the oral argument on the morning of September 24, 1999; that Mr. Walker presented an order granting summary judgment, and that Judge McDermott signed that order in my presence. I have no recollection of anything other than arguing the motion and leaving to attend to my case in Baldwin County. I have no recollection of Judge McDermott stating that summary judgment was granted. Had an order been signed in my presence, the uniform practice was that I would have been given a copy of the order.
>
> 4. If the Judge McDermott had signed a summary judgment order in my presence, I would have advised Mr. Krispin, lead counsel in Detroit, of the entry of such an order and faxed

> him a copy. I was never given a copy of the summary judgment order.
>
> 5. I never received notice of the entry of summary judgment until November 10, 1999, when I received a telephone call from the clerk's office concerning disposition of exhibits in the case.

Fincher's lead counsel in Detroit, Donald A. Krispin, spoke with Mr. Moorer by telephone later that day to inquire as to how the summary judgment hearing had gone. Mr. Krispin states (Krispin Aff. ¶ 5), "Mr. Moorer told me that the defendants' motion for summary judgment had been, and I quote 'taken under submission'. Mr. Moorer specifically used the words 'taken under submission' to describe the status of the motion for summary judgment."

J. Kelly Carley, one of Fincher's associate counsel in Detroit, states (Carley Aff. ¶ 6), "A couple of weeks after the hearing, I telephoned plaintiff's local counsel, Larry Moorer, and inquired as to whether he had yet received a ruling from the court. He explained that he had not." On September 22, two days prior to the hearing, Mr. Carley was advised by a member of Judge McDermott's staff that "the judge was not going to rule on a summary judgment motion on the date of the hearing" (Carley Aff. ¶ 5).

In the interval of time between September 24 and November 10, Detroit counsel mentioned the pending motion for summary judgment in conversation, and believed that the absence of a ruling indicated that Judge

McDermott was writing a memorandum opinion addressing the complex issues raised by the case. Krispin Aff. (6); Carley Aff. ¶(7)[3].

Lead Counsel in Detroit Relied Upon Local Counsel. Estate of Fincher's Detroit lead counsel states in his Affidavit:

> (2) The Fincher Estate retained the Jaques Firm to prosecute a claim for decedent Jabe Fincher's exposure to toxic chemicals during his shipboard career. When the decision was made to file suit in Circuit Court in Mobile, Alabama, the Jaques Firm retained Larry C. Moorer, a member of the Alabama Bar, to act as local counsel on the case. Strategic decisions and the drafting of pleadings, briefs, discovery responses and the like, were done by the main counsel in Detroit. The Jaques Firm relied upon Mr. Moorer as our local counsel to see to compliance with all local rules of practice, to monitor the status of the case and immediately report to us of case events such as entry of orders, scheduling of hearings and suchlike. The Jaques Firm typically would forward pleadings to Mr. Moorer for his review,

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[3] Mr. Carley had declined a defense request to stipulate to entry of summary judgment without further briefing or supplementation of the record. Mr. Carley stated at that time that the trial court "gave no opinion for its reasoning in striking the testimony of Plaintiff's experts. . . . Hopefully, this can be clarified in the Court's ruling on the Summary Judgment Motion." *See* Carley Aff. ¶(4) and Exhibit 2. Everyone knew the ruling was going up on appeal as soon as it was wrapped in an appealable package, so to speak, i.e., as a final appealable order.

> signature and filing with the Court.[4] Mr. Moorer also had responsibility for appearing at all court hearings scheduled in the Fincher matter.
>
> (3) On a regular basis Mr. Moorer would review the status of the Fincher case (as well as the Estate of Matthew Williams case which was also pending in the Mobile County Circuit Court). Whenever there was a case event appearing on the court docket, Mr. Moorer would obtain a copy of the relevant document and fax it to me in Detroit. The case file contains many duplicate documents since often I would receive a document from the court or opposing counsel by mail, and another copy from Mr. Moorer by fax.

It is undisputed that lead counsel in Detroit had no notice whatsoever of the entry of summary judgment until November 10, 1999, when they received telephonic advice that the Circuit Court was closing out and purging the file. Krispin Aff. ¶ (6).

Mr. Walker Told Mr. Carley That He Had Not Received A Ruling from the Court on Defendants' Motion for Summary Judgment. In its moving papers and Affidavit of Walker, Appellees *now* contend that summary judgment was entered at the September 24 hearing

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[4] Exhibit 9 is a good example of this practice. It shows the margin order by Judge McDermott dated December 2, 1999, granting Plaintiff's motion to extend the time for appeal. Mr. Moorer retrieved the copy of the margin order from his courthouse box and faxed it to Mr. Krispin in Detroit on December 3, 1999 (as shown by the fax-machine information imprinted at the top of the document).

in local counsel's presence. This is a complete turnabout from what Mr. Walker told Mr. Carley on November 10, 1999. Mr. Carley states in his Affidavit (Carley Aff. ¶ 8):

> On November 10, 1999, we received an inquiry from the Circuit Court asking whether we wanted our summary judgment exhibits returned, since the matter had not been appealed and the Court was purging the file. I spoke with Mr. Moorer, who again stated that he had never received any ruling on the motion for summary judgment. *That same day, I spoke with defense counsel, George Walker, and asked if he had received a ruling. He said that he had not,* and in fact, told me that he had just sent his paralegal over to the courthouse to check.

(Emphasis supplied.) Mr. Carley further states (Carley Aff. ¶ 11)

> On January 10, 2000, after reviewing the Affidavit of George M. Walker, I telephoned Mr. Walker and inquired again as to whether his statement to me on November 10, 1999 that he had not received any ruling (as referred to in ¶ 8, above) was true at the time it was made. Mr. Walker conceded that he had not received or seen a ruling from the court as of that date, but "knew it was signed that day". Mr. Walker did not explain how he "knew it was signed that day".

The implications of this change in stories is most distasteful[5], and requires, at a minimum, a remand to the lower

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[5] *See In re Morrow*, 303 Ore. 102, 108, 734 P.2d 867, 869 (1987) (characterizing as "an ethical duty of central importance to a

court for express findings as to where the truth actually lies.

The Trial Court Staff Indicated That Any Neglect Was That of Courthouse Staff. In his Affidavit Mr. Carley indicates that courthouse staff indicated that any failure to learn of the summary judgment order was due to failure of staff in the clerk's office to serve the order:

> (9) After talking with Mr. Moorer and Mr. Walker, I telephoned the court and spoke with Ms. Melissa Thomas, who works in Judge McDermott's chambers. I explained that we had not received a ruling and therefore were surprised at the court's inquiry concerning return of exhibits. She said that she would look into it and call me back.
>
> (10) Within an hour and a half, Ms. Thomas called back. She explained that there had been some mix-up between the judge's chambers and the office of the clerk of the court. She stated the ruling had never been given to the attorneys, as was the court's procedure. I then inquired as to what we should do. She explained that Judge McDermott knew of the mix-up and would entertain a request for an extension of time to appeal. We promptly commenced work on a motion to extend the time for filing our appeal.

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lawyer's professional relationships: the duty of truthfulness.", and the "gravity of deceitful statements"); *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F.Supp. 507, 512 (E.D.Mich. 1983) ("Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the [opposing counsel's] client . . . ")

> That motion was completed the next day (November, 11, 1999, Veterans' Day), was dispatched to the Court via overnight delivery service, and filed with the Circuit Court on November 12, 1999 (Exhibit 5).

The trial court's subsequent action in granting the motion for extension of time to appeal (Exhibit 9) indicates the Court's awareness of these facts.

Local Counsel Excercised Due Diligence in Keeping Himself Abreast of the Status of the Case. Indeed, Mr. Moorer's Affidavit shows that he checked the status of this case on nearly a daily basis:

> 6. In Mobile County Circuit Court, the trial judges uniformly follow a practice of distributing notice of their rulings through attorney mailboxes located in the clerk's office. All court orders, judgments and rulings, whether in the form of formal captioned orders, margin orders, or docket entries, are distributed to counsel in the form of copies placed in these mailboxes. Judge McDermott has followed this same procedure throughout the Fincher case. Every ruling that has been issued in the Fincher litigation has been distributed through the courthouse box.
>
> 7. I check my courthouse box nearly every day the courthouse is open. I followed this same procedure of almost daily retrieval of court documents in the period following the September 24, 1999 oral argument in Fincher. I never received any formal order or judgment, margin order, or docket sheet entry indicating that the motion for summary judgment had been ruled upon.

UNDER THE FACTS OF THIS CASE, IT WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION TO GRANT AN EXTENSION PURSUANT TO ALA.R.CIV.P. 77(d).

Appellees concede in their Motion that the trial court's action in allowing an extension of time under Rule 77(d) is a discretionary judgment call. In Alabama abuse of discretion is defined as "exceeding the gounds of reason, all the circumstances before the lower court being considered." *Valley Heating, Cooling & Electric Co. v. Alabama Gas Corp.*, 286 Ala. 79, 237 So.2d 470 (1970). Appellees further concede that Alabama Rule 77(d) is substantially similar to the Federal provision. Federal case law is consistent in holding that great deference is to be given to a trial court's grant of a motion to extend the time for appeal. *See, e.g., Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962); *Matter of Missionary Baptist Foundation of America*, 792 F.2d 502, 507 (5th Cir. 1986) (reviewing court should decline to second-guess trial court's extension of time for appeal); *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1564 (7th Cir. 1990) (second-guess trial court's extension of time to appeal only when "the party's excuse is so far afield (for example, counsel simply forgetting on day thirty to file the notice) that granting the extension would be a patent abuse of discretion."); *Brotherhood of Railway Carmen v. Chicago & N.W. Transportation Co.*, 964 F.2d 684, 686 (7th Cir. 1992) ("great deference must be accorded a district court's finding of excusable neglect, given its more intimate awareness of the circumstances surrounding the lapse of the 30-

day period."); *Allied Steel v. City of Abilene*, 909 F.2d 139, 142 (5th Cir. 1990) (great deference).

As one federal decision observes, "Our judicial system is built in large part on the studied discretion of the individual trial judge." *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727 (N.D.Ill.1977), citing *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368 (7th Cir.), cert. denied, 429 U.S. 907 (1976). In a case from Fincher's Detroit counsel's home, *People v. Williams*, 386 Mich. 565, 573, 194 N.W.2d 337 (1972), the Michigan Supreme Court wrote:

> [A]n abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.

Under the facts of this case, there was no abuse of discretion in permitting an extension of time to appeal, but rather a proper exercise of the trial court's discretion.

The Alabama caselaw on Rule 77(d) shows that an extension of time to appeal is in order where, as here, counsel make a diligent effort to keep abreast of case developments, but nevertheless fail to learn of the entry of an appealable order or judgment. In *Bacon v. Winn-Dixie Montgomery, Inc.*, 730 So.2d 600, 602 (Ala. 1998), "Bacon's counsel made no discernible effort, and thus did not act diligently, to 'keep abreast of the status of the case'" by checking with the clerk's office. The Moorer Affidavit shows that local counsel was checking with the Clerk's Office *virtually every day* in accord with local practice in the Mobile County Circuit Court, and that

where local practice was followed Mr. Moorer would immediately fax a copy of the notice, order or other document to lead counsel in Detroit.

The facts of this case are eminently distinguishable from those of *Greystone Close v. Fidelity and Guar. Ins. Co.*, 664 So.2d 900, 902 (Ala. 1995), relied on by the Appellees. In *Greystone* it was undisputed that the court clerk mailed the parties the Order in question and that they received it in ample time to file an appeal, but in essence "sat on their hands". This Court wrote, "The intent of Rule 77(d), Ala.R.Civ.P. was to allow an out-of-time appeal where fault for the untimely appeal does not lie with the party seeking to appeal." Appellant Estate of Fincher falls squarely within this scenario: It is undisputed that the trial court clerk failed to serve or otherwise give notice of the order granting summary judgment, and that local counsel checked at the courthouse nearly every day to see if such an order had been entered.

This case is akin to *Turner v. Barnes*, 687 So.2d 197 (Ala. 1997), in which this Court upheld an extension of time to appeal. In *Turner*, as herein, the clerk failed to give notice of the entry of certain adverse judgments. As in this case, there was also a delay in following the local practice. In *Turner* this local practice was logging judgments on a computer system; in the instant case the local practice was distribution of all rulings through the courthouse mailbox system. In *Turner*, and in the instant case, counsel acted diligently in an effort to "keep abreast of the status of this case", employing the accepted, uniform local practice for doing so.

Likewise, in *Sparks v. Alabama Power Co.*, 679 So.2d 678 (Ala. 1996), it was undisputed that the court clerk failed to give notice of an adverse ruling (denial of a motion for new trial). Although that order was entered on the case action summary sheet, it appeared that "no entry was made on the computer case record system used by the Jefferson circuit clerk's office personnel." 679 So.2d at 679. Sparks' counsel missed the normal 42-day deadline for filing an appeal. Sparks urged that the appeal should not be dismissed as untimely, urging that her counsel "periodically checked with the circuit clerk's office" concerning the case status. It appeared that the computerized docket did not reflect the trial court's ruling. This Court concluded that

> We believe it reasonable, under the facts of this case, to allow Mrs. Sparks to rely on the information affirmatively suppled her by the Jefferson circuit clerk's office – information indicating that as of the 90th day there had been no ruling on her motion for new trial.. Rule 1, Ala.R.Civ.P., and Rule 1, Ala.R.App.P., state that the Rules . . . must be construed to assure the just determination of every action. These rules evidence this Court's belief that every litigant must receive fair and just treatment from the court system of this State. Accordingly, we hold that where there is a material discrepancy between the information contained on the formal case action summary sheet in a case and the information contained in the circuit clerk's computerized docket, a litigant should not be penalized by relying in good faith on the information contained in either "document."

679 So.2d at 681. In the instant case, local counsel relied in good faith on the local practice of all the judges in Mobile County, and which specifically had been followed by the trial judge in this case, of advising of all case events by written notice through the courthouse box system.

Plaintiff-Appellant followed the proper procedure, acted timely once he learned of the Order; sought the right remedy, a Rule 77(d) motion[6], and in the correct forum[7]. The grant of an extension of time was not an abuse of discretion, and the motion to dismiss the appeal should be denied.

FEDERAL CASELAW SUPPORTS THE TRIAL COURT'S EXERCISE OF DISCRETION IN GRANTING THE EXTENSION OF TIME TO APPEAL.

Appellant further relies upon Federal caselaw interpreting the similar Federal provision, which caselaw supports the lower court's extension of time to appeal granted in this case.

Appellant notes that at a minimum, all parties and the lower court were on notice since May of 1999, when

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[6] *See Lindstrom v. Jones*, 603 So.2d 960 (Ala. 1992) (Rule 77(d) is exclusive remedy in situations where party claims lack of notice of an appealable judgment or order).

[7] This Court has upheld extensions in cases in which a litigant has been far less careful of observing proper procedure. *See, e.g., Etherton v. City of Homewood*, 700 So.2d 1374 (Ala. 1997) (giving party opportunity to establish good cause for Rule 77(d) relief, even though party addressed its motion to the wrong court).

Fincher filed its motion to certify for interlocutory appeal, that Plaintiff intended to appeal the trial court's underlying ruling excluding the testimony of all his expert witnesses. This factor weighs in favor of granting a motion for extension of time to appeal. *See Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206 (5th Cir. 1993) (no abuse of discretion in granting appellants extension of time to appeal; "The district judge could have properly found that the defendants were not prejudiced by the extension because they were already on notice, within the prescribed time period, that the plaintiffs were waging an appeal."); *McCarr v. United States*, 736 F.2d 912 (3d Cir. 1984) (undisputed that both trial court and opposing party were on notice that party intended to appeal, well within period in which timely notice of appeal could have been filed).

The determination whether a party's neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Investment Services v. Brunswick Associates*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993). In the present case it is undisputed that the parties never received notice of the order through the court clerk. This lack of notice is a major factor in a trial court's resolution of the excusable-neglect question. *Dugan v. Missouri Neon & Plastic Advertising Co.*, 472 F.2d 944, 948 (8th Cir. 1973) ("generally failure to learn of the entry of judgment constitutes the major reason for excusable neglect"); *McGarr v. United States*, 736 F.2d 912, 919 (3d Cir. 1984) "[L]ack of notice of entry of a judgment does not automatically authorize relief. . . . But lack of such

notice is certainly a factor in the excusable-neglect determination.")

In *Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916 (3d Cir. 1987), the Federal Third Circuit Court of Appeals found that trial court "erred as a matter of law" in its "rigid application" of the excusable-neglect doctrine permitting extension of time to appeal. The Court stated, "We find it clear . . . that the concept of excusable neglect encompasses more than acts, omissions, or events beyond the control of appellant and appellant's counsel."; rather, that the rule's "excusable neglect" standard "requires a case-by-case analysis." *Id.* "In order to judiciously apply the standard, a court must, at a minimum, make findings as to the reasons underlying counsel's inadvertence. There is a qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence." 827 F.2d at 919.

In the instant case, the lack of notice of the order, coupled with local counsel's almost *daily* "affirmative efforts to comply" with local practice demonstrate the trial court's grant of an extension of time was proper and ought to be upheld.

OUT-OF-STATE LEAD COUNSEL'S FAILURE TO LEARN OF THE SEPTEMBER 24 ORDER FURNISHES AN ADDITIONAL BASIS FOR AFFIRMANCE OF THE TRIAL COURT'S ORDER GRANTING AN EXTENSION OF TIME.

There appear to be no Alabama cases addressing the question of an extension of time to appeal in the circumstance where, as here, there was both a local counsel and

an out-of-state counsel, with the latter being in charge of making strategic decisions in the case. There are, however, reported federal cases going back nearly a half-century which demonstrate the propriety of granting an extension of time for appeal where out-of-state counsel failed to receive timely notice of an adverse ruling.

In *Babich v. Clower,* 528 F.2d 293 (4th Cir. 1975) it was held that the trial court erred in denying a motion to extend time to appeal, and that the trial court should have found the existence of excusable neglect. The case in question was filed in federal court in Virginia. Plaintiffs' primary lawyer was from Washington, D.C. and had associated with local counsel in Fairfax, Virginia. The trial court dismissed the case. Local counsel received notice, but the D.C. lawyer did not. Local counsel had relied upon a statement in the court's ruling that all counsel would be served with the order. In finding excusable neglect, the Court noted that "the Washington lawyer was in charge of the litigation", and "[t]he Washington [D.C.] lawyer could not have taken action without knowledge of the court's decision", and "[f]ailure to learn of the entry of judgment is the principal ground on which extensions of time for appeal are granted." 528 F.2d at 295.

The Fourth Circuit in *Babich* relied upon the earlier decision in *Resnick v. Lehigh Valley R. Co.,* 11 F.R.D. 76 (S.D.N.Y. 1951). In *Resnick,* the trial court granted a motion for extension of time to appeal where it appeared that "[t]rial counsel, who was in active charge of the matter" had not received notice of the entry of the judgment in question in time to file an appeal. Moreover, once lead counsel did learn of the judgment, he promptly

moved the court for an extension of time. Even though it appeared that the local attorney of record had received notice of the judgment, "The Court finds that upon all the facts there is a showing of excusable neglect." 11 F.R.D. at 77.

Cuevas v. Reading & Bates Corp., 770 F.2d 1371 (5th Cir. 1985), is to similar effect. In that case the lead attorney was based in Baton Rouge, Lousiana, with local counsel in Houston, Texas, where the cause was filed. The trial court dismissed the case for forum non conveniens on December 7, 1982, but Baton Rouge counsel did not receive court's decision until January 9, 1983. Once lead counsel in Baton Rouge had the order in hand, they promptly filed a notice of appeal and motion for extension of time to appeal. The Fifth Circuit held that the appeal was timely.

Appellees make no claim that lead counsel in Detroit knew of the trial court's entry of summary judgment. The cases cited furnish an additional basis for upholding the trial court's grant of an extension of time to appeal.

CONCLUSION

In *Etherton v. City of Homewood*, 700 So.2d 1374, 1378 (Ala. 1997), this Court wrote words which bear with equal force upon the facts of the present case:

> The dismissal of an appeal as untimely in a case in which the judiciary itself failed to follow the mandates of Rule 77(d) and thereby caused the untimeliness would not be "just." Indeed, it would be particularly repugnant, not only to the tenor of the rules, but also to justice, equity, and

> the integrity of the institution. It would be inequitable and unjust to hold a party strictly to the provisions of Rule 77(d) if the judiciary itself does not comply with them.

For the reasons set forth in this Brief, Plaintiff-Appellant prays that the Court deny the Motion to Dismiss Appeal; that the Court strike or disregard the Affidavit of George M. Walker; or, in the alternative, that the Court remand this matter to the Circuit Court for further fact-finding.

RESPECTFULLY SUBMITTED,

BY: _____

DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff/Appellant
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

– and –

BY: _____

LARRY CHARLES MOORER
Local Counsel for Plaintiff/Appellant
107 North Jackson Street
Mobile, Alabama 36602

Dated: January 12, 2000

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV-94-3907, Mobile County)

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff/Appellant,

-v-

AMERADA HESS CORP. et al.,

Defendants/Appellees.

APPELLANT'S CROSS-MOTION TO STRIKE MATERIALS OUTSIDE THE RECORD, AND ALTERNATIVE CROSS-MOTION TO REMAND FOR FURTHER FACTFINDING

NOW COMES PLAINTIFF/APPELLANT, Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased, through counsel undersigned, and moves to strike or disregard the Affidavit of George M. Walker, improperly submitted in support of the Motion to Dismiss Appeal dated December 30, 1999. Consideration of said affidavit is improper in that the document was never submitted to or reviewed by the Circuit Court in its decision to grant Plaintiff-Appellant an extension of time to appeal. In the alternative, Appellant moves the Court to remand the matter to the Circuit Court for further factfinding upon the genuine issues of fact raised by the Motion to Dismiss Appeal. For the reasons further set forth in Appellant's Brief in Opposition to Motion to

Dismiss Appeal arid in Support of Cross-Motion to Strike Materials Outside the Record, and Alternative Cross-Motion to Remand for Further Factfinding, Appellant respectfully requests that this Court strike or disregard the Affidavit of George M. Walker, or remand to the lower court for additional factfinding.

RESPECTFULLY SUBMITTED,

BY: /s/ Donald A. Krispin
DONALD A. KRISPIN
The Jaques Admiralty Law Firm, P.C.
Attorneys for Plaintiff/ Appellant
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

-and-

By: /s/ Larry Charles Moorer
LARRY CHARLES MOORER
Local Counsel for Plaintiff/Appellant
107 North Jackson Street
Mobile, Alabama 36602

Dated: January 12, 2000

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV 94-3907, Mobile County)

CREIGHTON E. MILLER,

Administrator of the Estate of
JABE J. FINCHER, SR.,
Deceased,

Plaintiff/Appellant

v.

AMERADA HESS CORP, et al

Defendants/Appellees.

STATE OF ALABAMA)
)
COUNTY OF MOBILE)

AFFIDAVIT OF LARRY C. MOORER

Personally appeared before me a notary Public in and for said State and County, Larry C. Moorer, who first being by me duly sworn, deposes and states as follows:

1. My name is *Larry* C. Moorer and I am the local counsel of record for the Plaintiff/Appellant in the above captioned case. I make this Affidavit in opposition to the Motion to Dismiss Appeal filed in this matter. I have first hand knowledge of all facts set forth herein.

2. On Friday, September 24, 1999, I appeared before Judge McDermott in the Circuit Court and argued Plaintiff's position in opposition to Defendants' Motion for

summary Judgment. I recall waiting for some time in the courtroom before our case was called. I recall arguing the motion, and that the argument was fairly brief, being only a few minutes long. Once the oral argument on the motion was over, I immediately left because I also had a hearing scheduled in Baldwin County that morning.

3. I have read the Motion to Dismiss and the Affidavit of George M. Walker, and I am aware that Defendants/Appellees claim that Judge McDermott actually granted summary judgment at the oral argument on the morning of September 24, 1999; that Mr. Walker presented an order granting summary judgment, and that Judge McDermott signed that order in my presence. I have no recollection of anything other than arguing the motion and leaving to attend to my case in Baldwin County. I have no recollection of Judge McDermott stating that summary judgment was granted. Had an order been signed in my presence, the uniform practice was that I would have been given a copy of the order.

4. If Judge McDermott had entered an order, I would have advised Mr. Krispin, lead counsel in Detroit, of the entry of such an order and faxed him a copy. I was never given a copy of the summary judgment order.

5. I never received notice of the entry of summary judgment until November 10, 1999, when I received a telephone call from the clerk's office concerning disposition of exhibits in the case.

6. In Mobile County Circuit Court, the trial judges uniformly follow a practice of distributing notice of their rulings through attorney mailboxes located in the clerk's office. All court orders, judgments and rulings, whether

in the form of formal captioned orders, margin orders, or docket entries, are distributed to counsel in the form of copies placed in these mailboxes. Judge McDermott has followed this same procedure throughout the Fincher case. Every ruling that has been issued in the Fincher litigation has been distributed through the courthouse box.

7. I check my courthouse box nearly every day the courthouse is open. I followed this same procedure of almost daily retrieval of court documents in the period following the September 24, 1999 oral argument in Fincher. I never received any formal order or judgment, margin order, or docket sheet entry indicating that the motion for summary judgment had been ruled upon.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Larry C. Moorer
LARRY C. MOORER

Sworn to and subscribed before me this 12th day of January, 2000.

/s/ Kimberly A. Holt
NOTARY PUBLIC
My Commission Expires:
11-25-2000

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV-94-3907, Mobile County)

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff/Appellant,

-v-

AMARADA HESS CORP. et al.,

Defendants/Appellees.

AFFIDAVIT OF DONALD A. KRISPIN

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

DONALD A. KRISPIN, being first duly sworn, deposes and states:

(1) I am an attorney associated with the Jaques Admiralty Law Firm of Detroit, Michigan, counsel for the Estate of Jabe J. Fincher, Senior. I have been involved with the Fincher case ever since it was filed in the Mobile County Circuit Court. I have been lead counsel on the case ever since the death of Leonard Jaques in June of 1998, and have been admitted pro hac vice in this case. I make this affidavit in opposition to the Motion to Dismiss Appeal filed by Defendant-Appellees. I have firsthand knowledge of the matters set forth herein.

(2) The Fincher Estate retained the Jaques Firm to prosecute a claim for decedent Jabe Fincher's exposure to toxic chemicals during his shipboard career. When the decision was made to file suit in Circuit Court in Mobile, Alabama, the Jaques Firm retained Larry C. Moore, a member of the Alabama Bar, to act as local counsel on the case. Strategic decisions and the drafting of pleadings, briefs, discovery responses and the like, were done by the main counsel in Detroit. The Jaques Firm relied upon Mr. Moorer as our local counsel to see to compliance with all local rules of practice, to monitor the status of the case and immediately report to us of case events such as entry of orders, scheduling of hearings and suchlike. The Jaques Firm typically would forward pleadings to Mr. Moorer for his review, signature and filing with the Court. Mr. Moorer also had responsibility for appearing at all court hearings scheduled in the Fincher matter.

(3) On a regular basis Mr. Moorer would review the status of the Fincher case (as well as the Estate of Matthew Williams case which was also pending in the Mobile County Circuit Court). Whenever there was a case event appearing on the court docket, Mr. Moorer would obtain a copy of the relevant document and fax it to me in Detroit. The case file contains many duplicate documents since often I would receive a document from the court or opposing counsel by mail, and another copy from Mr. Moorer by fax.

(4) Prior to the September 24, 1999 oral argument before Judge McDermott on the motion for summary judgment, Mr. Moorer was advised that he would be covering that hearing and arguing Estate of Fincher's position in opposition to that motion.

(5) I was in Detroit on Friday, September 24, 1999. On that afternoon I telephoned Mr. Moorer from the Jaques Law Office to inquire as to how the oral argument had gone. Mr. Moorer told me that the defendants' motion for summary judgment had been, and I quote "taken under submission". Mr. Moorer specifically used the words "taken under submission" to describe the status of the motion for summary judgment.

(6) Between September 24 and November 10, 1999, when the Jaques Firm was advised telephonically that a summary judgment order had been entered, I never received anything from Mr. Moorer even hinting, much less stating, that the motion for summary judgment argued on September 24, 1999 had been granted by the Court. The issues raised by the motion for summary judgment were complex ones, and I recall that in conversation with other lawyers in the Detroit office we believed that Judge McDermott was probably writing a memorandum opinion clarifying and explaining the reasons for his as yet unannounced summary judgment ruling.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Donald A. Krispin
DONALD A. KRISPIN

SUBSCRIBED AND SWORN TO BEFORE ME THIS DAY OF JANUARY, 2000.

[Texas Notary Seal]

NOTARY PUBLIC

IN THE SUPREME COURT OF ALABAMA

Supreme Court Docket No. 1990431

(Trial Ct. No. CV-94-3907, Mobile County)

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff/Appellant,

-v-

AMERADA HESS CORP. et al.,

Defendants-Appellees.

AFFIDAVIT OF J. KELLY CARLEY

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

J. KELLY CARLEY, being first duly sworn, deposes and states:

(1) I am an attorney associated with the Jaques Admiralty Law Firm of Detroit, Michigan, counsel for the Estate of Jabe J. Fincher, Senior in the above-captioned case. While Donald Krispin is the lead counsel on this file, I have had substantial involvement with the case, including scheduling and conduct of depositions and preparation of briefing and exhibits in opposition to the defendants' motion for summary judgment. I make this affidavit in opposition to the Motion to Dismiss Appeal

filed by Defendant-Appellees. I have firsthand knowledge of the matters set forth herein.

(2) I believe there is no dispute that in this case the trial court on May 7, 1999 granted defendants' motion to exclude the testimony of plaintiff's expert witnesses. At the same time the trial court suggested that it was receptive to a request to certify that non-final ruling for an interlocutory appeal. Plaintiff promptly made a motion for such certification, which was granted. Plaintiff then petitioned the Supreme Court for leave to take an interlocutory appeal.

(3) This Court denied the petition for interlocutory appeal without further comment on August 6, 1999. This left the Fincher case in a sort of "limbo" in the trial court: The case had not been formally dismissed, there was no final appealable order in place, yet the trial court would not put the case on the trial docket given that a crucial portion of plaintiff's proofs had been excluded. On August 12, 1999, defendants made a fairly cursory or pro forma motion for summary judgment based on the trial court's earlier ruling excluding plaintiff's expert testimony.

(4) On September 9, 1999 – before plaintiff had had the opportunity to submit briefing or evidence in response to the motion for summary judgment – defense counsel George M. Walker, Esq. faxed a letter to Mr. Krispin asking plaintiff to stipulate to entry of summary judgment (Exhibit 1 to brief in opposition to motion to dismiss appeal). I was handling the response to the summary judgment motion, and on September 10, 1999 I responded to Mr. Walker, respectfully declining the offer

(Exhibit 2). Everyone knew that the case was going up on appeal as soon as the trial court entered a final appealable order, and I noted in my letter that the existing record was "slim" and needed to be supplemented. I further noted that the trial court "gave no opinion for its reasoning in striking the testimony of Plaintiff's experts. . . . Hopefully, this can be clarified in the Court's ruling on the Summary Judgment Motion."

(5) I prepared the briefing in opposition to the motion for summary judgment calendared for oral argument on Friday, September 24, 1999. This briefing included voluminous exhibits, including complete copies of all crewmate and expert depositions. Transporting these voluminous documents down to Alabama and arranging for their filing with the trial court prior to oral argument presented a practical problem. On Wednesday, September 22, 1999, I telephoned the circuit court and spoke with someone in Judge McDermott's chambers, and inquired whether the Court wanted all the exhibits faxed down to it. I was told that the exhibits could be brought in at the time of the hearing, because the judge was not going to rule on a summary judgment motion on the date of the hearing.

(6) A couple of weeks after the hearing, I telephoned plaintiff's local counsel, Larry Moorer, and inquired as to whether he had yet received a ruling from the court. He explained that he had not.

(7) I recall in the interval between September 24 and November 10 having conversation with other lawyers in our Detroit office, to the effect that the Fincher motion for summary judgment was still under advisement; that the

issues involved in the motion were complex; and that Judge McDermott was probably writing a memorandum opinion explaining and clarifying the issues, which he intended to issue at the same time he ruled on the motion.

(8) On November 10, 1999, we received an inquiry from the Circuit Court asking whether we wanted our summary judgment exhibits returned, since the matter had not been appealed and the Court was purging the file. I spoke with Mr. Moorer, who again stated that he had never received any ruling on the motion for summary judgment. That same day, I spoke with defense counsel, George Walker, and asked if he had received a ruling. He said that he had not, and in fact, told me that he had just sent his paralegal over to the courthouse to check.

(9) After talking with Mr. Moorer and Mr. Walker, I telephoned the court and spoke with Ms. Melissa Thomas, who works in Judge McDermott's chambers. I explained that we had not received a ruling and therefore were surprised at the court's inquiry concerning return of exhibits. She said that she would look into it and call me back.

(10) Within an hour and a half, Ms. Thomas called back. She explained that there had been some mix-up between the judge's chambers and the office of the clerk of the court. She stated the ruling had never been given to the attorneys, as was the court's procedure. I then inquired as to what we should do. She explained that Judge McDermott knew of the mix-up and would entertain a request for an extension of time to appeal. We

promptly commenced work on a motion to extend the time for filing our appeal. That motion was completed the next day (November 11, 1999, Veterans' Day), was dispatched to the Court via overnight delivery service, and filed with the Circuit Court on November 12, 1999 (Exhibit 5).

(11) On January 10, 2000, after reviewing the Affidavit of George M. Walker, I telephoned Mr. Walker and inquired again as to whether his statement to me on November 10, 1999 that he had not received any ruling (as referred to in ¶ 8, above) was true at the time it was made. Mr. Walker conceded that he had not received or seen a ruling from the court as of that date, but "knew it was signed that day". Mr. Walker did not explain how he "knew it was signed that day".

FURTHER AFFIANT SAYETH NAUGHT.

/s/ J. Kelly Carley
J. KELLY CARLEY

SUBSCRIBED AND SWORN TO BEFORE ME THIS DAY OF JANUARY, 2000.

_____ [Michigan Notary Seal]
NOTARY PUBLIC

APPELLANT'S BRIEF

IN OPPOSITION TO MOTION TO DISMISS APPEAL
- and -
IN SUPPORT OF CROSS-MOTION TO STRIKE MATERIALS OUTSIDE THE RECORD, AND ALTERNATIVE CROSS-MOTION TO REMAND FOR FURTHER FACTFINDING

EXHIBITS

NO.	DATE	DESCRIPTION OF DOCUMENT
1	09/09/1999	Letter to Donald A. Krispin, Esq. (Detroit lead counsel) from George M. Walker, Esq., asking plaintiff to stipulate to entry of summary judgment
2	09/10/1999	Letter to George M. Walker, Esq. from J. Kelly Carley, Esq., respectfully declining to stipulate to entry of summary judgment
3	09/21/1999	Notice of hearing on various motions set for September 24, 1999, including motion for summary judgment in Creighton Miller (Estate of Fincher) v. Keystone Tankship Corp.; received by Detroit counsel via fax from Larry C. Moorer, Esq.
4	09/24/1999	Order granting summary judgment
5	11/12/1999	Plaintiff's Motion to Extend time to File Appeal as of Right; Brief in Support of same; Certificate of Service, proposed Order (dated 11/11/1999, filed with court 11/12/1999)
6	11/12/1999	Letter to Honorable Edward B. McDermott from Donald A. Krispin,

		advising that notice of appeal will be filed as soon as possible
7	11/12/1999	Response to Motion to Extend Time to File Appeal as of Right; Certificate of Service
8	11/15/1999	Notice of Appeal to the Supreme Court of Alabama
9	12/02/1999	Margin order of Circuit Court, granting motion to extend time to file appeal

EXHIBIT 1

HAND ARENDALL, L.L.C.
LAWYERS

[Names and Addresses Omitted In Printing]

Writer's Direct Dial (394) 694-6296

September 9, 1999

VIA FACSIMILE
313-0961-5275

Donald A. Krispin, Esquire
The Jaques Admiralty Law Firm, P.C.
1370 Penobscot Building
Detroit, Michigan 48226

RE: Case No.: 94-3907
Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased v. Keystone Tankship Corporation, et al.

Dear Don:

I have just received word from Judge McDermott's office that he has scheduled a hearing on defendants' Motion for Summary Judgment for 9:00 a.m. on Friday, September 24, 1999. His clerk asked me to notify all the other counsel, and by this letter I am doing so.

My impression during our last conversation was that plaintiff generally agreed that summary judgment is due to be entered in this case, inasmuch as the Court has struck the testimony of plaintiff's experts and plaintiff has no other evidence with which to oppose the summary judgment motion. If that is the case, why don't we just agree that summary judgment can be entered on that basis, with the understanding that plaintiff would have

responded to the summary judgment motion but for the Court's having struck the affidavit testimony of his experts. Please let me know.

Sincerely,

/s/ George M. Walker

George M. Walker
For the Firm

GMW.kb
cc: Larry C. Moorer, Esquire

EXHIBIT 2

THE JAQUES ADMIRALTY LAW FIRM

ATTORNEYS AND COUNSELORS AT LAW

MARITIME LAW ADVOCATES

[Names and Addresses Omitted In Printing]

September 10, 1999

George M. Walker, Esq.
Hand, Arendall, Bedsole, Greaves
& Johnston, L.L.C.
3000 First National Bank Building
Mobile, Al 36601

RE: *Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Dec'd. v. Keystone Tankship Corporation, et al. Case No. 94-3907*

Dear Mr. Walker:

Please be advised that the undersigned is currently handling this matter. We are in receipt of your September

9, 1999 correspondence wherein you explained that we have a September 24, 1999 hearing date for Defendants' Motion for Summary Judgment. Also, you inquire as to whether Plaintiff will stipulate to the entry of a Motion for Summary Judgment based upon the Court's earlier ruling to strike the testimony of Plaintiff's experts. We have to respectfully decline this offer.

There are a number of reasons for our refusal. First, it is unclear what standard the Court employed in striking the testimony of Plaintiff's experts. What is clear is that the highest standard must be applied by the court in ruling on the Motion for Summary Judgment. Further the record for the Court of Appeals is very slim and convoluted in this matter. There was no record of oral argument and the Court gave no opinion for its reasoning in striking the testimony of Plaintiff's experts. This is especially confusing in light of the Defendants' shotgun approach in moving to strike Plaintiff's experts. Hopefully, this can be clarified in the Court's ruling on the Summary Judgment Motion.

If you have any questions, please feel free to contact me at any time.

Very truly yours,

/s/ J. Kelly Carley

J. KELLY CARLEY

JKC/emc

EXHIBIT 3

CIRCUIT COURT, CIVIL DIVISION
MOBILE COUNTY
FRIDAY, SEPTEMBER 24, 1999 9:00 a.m.

JUDGE EDWARD MCDERMOTT COURTROOM 8100

1. CV-94-3907-CREIGHTON MILLER ETC VS KEYSTONE TANKSHIP CORP ET AL
   Defts motion for court to enter summary judgment in defts favor as a matter of law based on the pleadings.
   LARRY MOORER JOSEPH ALLEN JR GREGORY BUFFALOW BEN HARRIS III DEBORAH WEEDMAN-PRO SE GEORGE WALKER KAREN TURNER LOUIS WOOLF GROVER ASMUS II JOSEPH ESPOSITO ALAN MACDONALD LAWRENCE VOIT DOUGLAS BROWN

2. CV-95-3822 & CV-96-87-CAROL WILLIAMS ET AL MARY SUE THRASH ET AL VS SERVICE CORP INT'L ET AL SCI ALABAMA FUNERAL SERVICES INC
   Pltff's motion to disburse funds deposited in court by deft SCI Alabama Funeral Service Inc.
   GARY FILLINGIM PETER BURNS JOHN WHITAKER REGGIE COPELAND ANDREW CAMPBELL DAVID LOPER EDWARD DEAN ELIZABETH BARGER ANTHONY
   Pltff's amended motion to direct Clerk of the Court to disburse funds to Gillis Advertising and to Garner, Prichard and Middleton for expenses.

3. CV-98-1513-PATRICIA R COATE ET AL VS CAMPO ELECTRONICS ETC ET AL
   (5) Daniell, Upton & Perry P.C's motion to determine division of attorney's fees.
   DAVID F DANIELL BRUCE KINGSDORF JOHN LEACH JR WILLIAM LANCASTER MICHAEL KNIGHT

4. CV-98-2369-KARRIE L ENOCHS ETC VS DEGUSSA CORPORATION ET AL
(2) Pltff's motion to approve settlement and for disbursement of proceeds.
RICHARD TAYLOR VICTOR HUDSON MICHAEL CUMPTON WINN FAULK WILLIAM HARDIE DAVID HANNAN

5. CV-98-2603-JAN BENTLEY LAIRD VS DAIRY FRESH CORP ET AL TRIAL: 10-13-99
Defts Dairy Fresh Corp and Herman Dement's motion to bifurcate trial of negligent/wanton entrustment claims
ALLEN RITCHIE JEFFREY LUTHER CHRISTOPHER GEORGE JAMES KILLION

6. CV-98-2850-CHRISTY BOERNER ETC ET AL VS JAMES ANTHONY CAMPBELL SR
Deft's motion for mental examination of pltff Fether Boerner/Pltff's objection.
MACK BINION III KIMBERLY HODGSON D E BRUTKIEWICZ JR

7. CV-98-3843-CHARLEY C REED ETC VS OUR SOUTHER HOME INC
(4) Deft Our Southern Home Inc's motion to compel pltff to respond to defts int/rfp.
RAMSEY SIMON DAVIS CARR THOMAS ROCKWELL

8. CV-99-571-SANDRA M RICHARD VS CITY OF MOBILE
(3) City of Mobile's motion for judgment on the pleadings. Motion to dismiss deft City of Mobile.
TOM DOYLE GREG EVANS CHARLES MILLER MARK SPEAR

9. CV-99-757-WILLIAM PAUL FERRIS VS JENNIFER BALLACK ET AL
(2) Pltff's motion to compel deft Jennifer Lee Ballack to produce items requested in production of documents dated 6/23/99/
JODY BISHOP ALEX GOLDSMITH JAMES BUSSIAN WINDY COCKRELL BITNER JOHN L WHITE

10. CV-99-1190-PATRICIA TATE ETC VS CHARTERWOODS BEHAVIORAL HEALTH SYSTEMS ETC ET AL
(4) Deft Charterwoods Behavioral Health Systems Inc & Magellgan Health Services Inc's motion to exclude from expedited case mgmt system.
(3) Pltff's objection to issuance of subpoena for production or inspection to Dr. Daniel Becker.
A EVANS CROWE HELEN J ALFORD THOMAS ROCKWELL

11. CV-99-1762-ASHLEY MCLEMORE ETC VS THOMAS A SNOWDEN JR ET AL
Defts' motion for court to enter summary judgment in their favor as a matter of law.
STEVEN L TERRY FRANK C ELLIS JR JOSEPH J MINUS JR RYAN T NORTHRUP

12. CV-99-2752-CITY OF MOBILE ETC VS ALTA M BROADUS ETC
Deft Alta M Broadus' verified answer and agreement to entry of consent judgment.
WAND J COCHRAN BERT P NOOJIN

Exhibit 4

[Reproduced at pages 86 to 87]

EXHIBIT 5

[Reproduced at pages 29 to 34]

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER
Administrator of the Estate of
JABE J. FINCHER, Sr., Deceased,

Plaintiff,

-v-

KEYSTONE TANKSHIP CORP. et al.,

Defendants. **Civil Action No. CV-94-3907**

ORDER

GRANTING PLAINTIFF'S MOTION
TO EXTEND TIME TO FILE APPEAL AS OF RIGHT

This cause is before the Court on Plaintiff's Motion to Extend Time to File Appeal as of Right. Good cause appearing, **IT IS ORDERED** that the Motion is **GRANTED**.

Plaintiff shall file his Notice of Appeal on or before Monday, November 22, 1999.

DONE this ___ day of November, 1999.

HON. EDWARD B. MCDERMOTT
CIRCUIT COURT JUDGE

EXHIBIT 6

THE JAQUES ADMIRALTY LAW FIRM

ATTORNEYS AND COUNSELORS AT LAW

MARITIME LAW ADVOCATES

[Names and Addresses Omitted in Printing]

November 12, 1999

VIA UPS OVERNIGHT DELIVERY

The Honorable Edward B. McDermott
Circuit Court Judge
Mobile County Circuit Court
109 Government Street
Mobile, Alabama 36601

RE: *Miller (Estate of Fincher) v. Keystone Tankship Corp./No. CV-94-3907*

Dear Judge McDermott:

I am writing to the Court to advise that as soon as possible, our local counsel, Mr. Moorer, will be filing a Notice of Appeal to the Alabama Supreme Court. This is not intended to have any effect on Plaintiff's pending motion asking the Court to extend the time to file the appeal. Rather, Plaintiff wishes the record to be clear that

once he had notice of the Court's September 24, 1999 summary judgment ruling, he acted quickly to assert his rights.

Very truly yours,

/s/ Donald A. Krispin

Donald A. Krispin

cc: All counsel of record

EXHIBIT 7

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,	§	
Plaintiff,	§	CIVIL ACTION NO. CV-94-3907
vs.	§	
KEYSTONE TANKSHIP CORPORATION, et al.,	§	
Defendants.	§	

RESPONSE TO MOTION TO EXTEND TIME TO FILE APPEAL AS OF RIGHT

Defendants respond as follows to plaintiff's Motion to Extend Time to File Appeal as of Right:

1. The defendants' Motion for Summary Judgment was granted by the Court in open Court during motion docket on Friday, September 24, 1999, the day on which the motion was argued. Plaintiff's counsel was present in the courtroom at the time the Court announced its decision to grant summary judgment.

2. The written Order entering summary judgment was presented to the court at the motion docket on September 24, 1999 by counsel for defendants, and was signed by the Court in the presence of counsel for plaintiff.

3. Because counsel for plaintiff was present at the time that the Court announced in open court its decision to grant the Motion for Summary Judgment filed by defendants, and because plaintiff's counsel was present at the time the written Order was signed, this case does not present a situation under Rule 77(d) of the Alabama Rules of Civil Procedure that would authorize the Court to relieve a party for failure to appeal within the time allowed. As the committee comments to Rule 77(d) state:

> . . . the clerk need not notify those who received actual notice by being present or were otherwise notified when the order or judgment was entered.

WHEREFORE, defendants request that plaintiff's Motion to Extend Time to File Appeal as of Right be denied as a matter of law.

/s/ George M. Walker
GEORGE M. WALKER
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Gulf Oil Corporation
Hess Oil Virgin Islands Corporation
Marathon Oil Company
Monsanto Company
Shell Oil Company
Sun Company, Inc. (R&M)
Texaco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, November 12, 1999, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

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EXHIBIT 8

[Reproduced at pages 38 to 42]

EXHIBIT 9

[Reproduced at page 28]

No. 00-1363

Supreme Court, U.S.
FILED
MAR 20 2001
CLERK

In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,

Petitioner,

v.

AMERADA HESS CORPORATION; AMOCO CORPORATION; ASHLAND OIL, INC.; ATLANTIC RICHFIELD COMPANY; CROWN CENTRAL PETROLEUM CORPORATION; EXXON CORPORATION; GULF OIL CORPORATION; HESS OIL VIRGIN ISLANDS CORPORATION; MARATHON OIL COMPANY; MONSANTO COMPANY; SHELL OIL COMPANY; SINCLAIR REFINING COMPANY; STANDARD OIL COMPANY; STANDARD OIL COMPANY OF INDIANA; SUN COMPANY, INC. (R&M); TEXACO, INC.; UNION CARBIDE CORP.; KEYSTONE TANKSHIP CORP.; MARINE TRANSPORT LINES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents:
Amerada Hess Corporation; Atlantic Richfield Company; Ashland Oil, Inc.; Amoco Corporation; Crown Central Petroleum Corporation; Exxon Corporation; Gulf Oil Corporation; Hess Oil Virgin Islands Corporation; Marathon Oil Company; Monsanto Company; Shell Oil Company; Sun Company, Inc. (R&M); Texaco, Inc.; Union Carbide Corporation

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REASONS FOR DENYING THE WRIT

Petitioner seeks review of a claimed constitutional error that was never presented to or argued in the courts below. In essence, Petitioner seeks review of the Supreme Court of Alabama's dismissal of his appeal by asserting, for the first time here, that his federal rights were implicated. However, the Supreme Court of Alabama dismissed the underlying appeal based upon Alabama procedure and based upon Alabama case law, and there were no federal constitutional rights implicated or affected. Petitioner's effort to invoke the jurisdiction of this Court is misguided and, indeed, the petition should be denied for want of certiorari jurisdiction under 28 U.S.C. § 1257.

I. PETITIONER HAS NOT IDENTIFIED ANY COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Petitioner has failed to state or identify a compelling reason for granting this writ of certiorari, as required by Supreme Court Rule 10. Moreover, Petitioner has made no showing that the decision of the Supreme Court of Alabama decided an important federal question in a way that conflicts with the decision of another state court of last resort, or of a United States Court of Appeals, or of this Court. To the contrary, the federal questions as to which Petitioner seeks review in this Court were never presented to the Supreme Court of Alabama. At best, Petitioner argues that there was a misapplication of a properly stated rule of law, the very type of review

"rarely granted" under the strictures of Supreme Court Rule 10.

II. PETITIONER FAILED TO PRESERVE THE FEDERAL QUESTIONS PRESENTED IN HIS PETITION, THEREBY DEPRIVING THIS COURT OF JURISDICTION IN THIS CASE.

This Court does not generally consider federal claims in reviewing state court judgments where the federal claims were not presented to and considered by the state court. Most recently, in *Adams v. Robertson*, 520 U.S. 83 (1997), the Court stated:

> With "very rare exceptions" . . . we have adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Id. at 86 (citation omitted).

Adams is simply the latest in the long line of cases in which this Court has refused to entertain federal claims not raised until presented to this Court. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court . . . the long-standing rule that this Court will not consider such claims creates, at the least, a weighty presumption against review."); *Webb v. Webb*, 451 U.S. 493, 496-97 (1981) ("It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state

court can arise only if the record as a whole shows either expressly or by implication that the federal claim was adequately presented in the state system."); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the [State] Supreme Court did not pass on the question, we may not do so."); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider questions affecting the validity of state statutes not urged or considered there.").

It is undisputed that Petitioner did not present either his due process claim or his equal protection claim in the Supreme Court of Alabama or in the circuit court there, and that he thereby failed to preserve any federal question for review by this Court. For this reason, the Petition for Writ of Certiorari should be denied.

III. PETITIONER HAD SEVERAL OPPORTUNITIES TO PRESENT HIS FEDERAL CLAIMS IN THE STATE COURTS, YET HE FAILED TO DO SO.

Petitioner cites an Ohio appellate court decision for the proposition that he had "no reason to raise the dispute to a constitutional level until the Alabama Supreme Court interpreted and applied its rule of civil procedure in such a way as to deny Fincher due process." (Pet., p. 8,

n. 8). This facile and disingenuous argument ignores Petitioner's responsibility under long-standing law in this Court to present federal questions in the first instance to the state courts, and it seeks to excuse conduct that is procedurally inexcusable.

There were at least three different occasions when Petitioner could have presented his federal claims to the state courts:

1. Motion to Extend Time to File Appeal as of Right. (Pet. App. 65-65). When Petitioner asked the circuit court to extend the time for his appeal due to his failure to receive a copy of the judgment from the clerk, he could have – and should have – asserted that the strict enforcement of the 42 day appeal period would violate his due process and equal protection rights. He did not do so.

2. Brief in Opposition to Motion to Dismiss the Appeal. (Pet., App. 91-115). When Petitioner filed his brief in opposition to Respondents' Motion to Dismiss the Appeal in the Supreme Court of Alabama, he could have – and should have – asserted that dismissal of the appeal would violate his equal protection or due process rights under the United States Constitution. If he had raised this issue then, the Supreme Court of Alabama could have addressed it. But he did not do so.

3. In an application for rehearing in the Supreme Court of Alabama. Under Rule 40 of the Alabama Rules of Appellate Procedure, Petitioner was entitled to file an application for rehearing in the Supreme Court of Alabama, in which he could have – and should have – asserted that dismissal of the appeal violated his due process and equal protection rights under the United

States Constitution. He did not file an application for rehearing. It is quite disingenuous for Petitioner to assert that his due process rights were violated when he failed to take advantage of the process that was available to him.

In this regard, the Petition here fails to comply with Supreme Court Rule 14.1(g)(i), inasmuch as it fails to identify "when the federal questions sought to be reviewed were raised" or "the method or manner of raising them and the way in which they were passed on by the court." *Id.* While Petitioner purports to comply with the rule at pages 9-12 of the Petition, it is clear that he can point to nothing in the record evidencing that any federal question was ever raised or passed upon in the state courts. Under the circumstances, there is nothing in the Petition "to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." *Id.*

IV. THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL OR MERITORIOUS.

Even if the federal questions for which review is sought had properly been presented below and preserved, this Court should nevertheless refuse review because the questions are not substantial or meritorious. Petitioner lost his right to appeal from a state court civil judgment, but he lost that right not simply because his lawyer did not receive a copy of the written judgment within the period of time permitted for perfection of an appeal. The trial court in open court and with all counsel present, granted the respondents' Motion for Summary

Judgment from the bench. Moreover, the trial court in open court signed the Order prepared by Respondents' counsel granting summary judgment. Therefore, the suggestion that Petitioner's counsel was not aware of the grant of summary judgment until November 10, 1999, is simply incorrect. The judgment was recorded on the court's docket sheet, but Petitioner's counsel never reviewed that despite his knowledge that a ruling was imminent. The entry of the order was known to the staff of the Judge who entered the judgment, but Petitioner's counsel never inquired there either, despite knowing that a ruling was imminent. Finally, the entry of judgment was known to Respondents' counsel, yet Petitioner's counsel never inquired of him either, despite knowing that a ruling was imminent. Petitioner's argument that he was not afforded constitutional notice is meritless, inasmuch as his counsel failed to follow up on the results of the summary judgment hearing.

Alabama has adopted a rule of civil procedure that does not permit a party to claim a failure of service by a clerk of an order or a judgment as a basis for failure to file a timely appeal, unless the party also demonstrates excusable neglect. Alabama Rule of Civil Procedure 77(d); *see also Bacon v. Winn-Dixie Montgomery, Inc.*, 730 So. 2d 600, 602 (Ala. 1998). Petitioner was unable to demonstrate excusable neglect to the satisfaction of the Supreme Court of Alabama. (Pet., App. 9). Clearly, Petitioner was afforded all of his rights under the procedures adopted by Alabama for litigation of civil actions in its courts, and was not subjected to any meaningful constitutional violation.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Marathon Oil Company
Monsanto Company
Shell Oil Company
Sun Company, Inc. (R&M)
Texaco, Inc.
Union Carbide Corporation

(3)

No. 00-1363

Supreme Court, U.S.
FILED
APR 13 2001
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In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of JABE J. FINCHER, SR., Deceased,

Petitioner,

v.

AMERADA HESS CORPORATION; AMOCO CORPORATION; ASHLAND OIL, INC.; ATLANTIC RICHFIELD COMPANY; CROWN CENTRAL PETROLEUM CORPORATION; EXXON CORPORATION; GULF OIL CORPORATION; HESS OIL VIRGIN ISLANDS CORPORATION; MARATHON OIL COMPANY; MONSANTO COMPANY; SHELL OIL COMPANY; SINCLAIR REFINING COMPANY; STANDARD OIL COMPANY; STANDARD OIL COMPANY OF INDIANA; SUN COMPANY, INC. (R&M); TEXACO, INC.; UNION CARBIDE CORP.; KEYSTONE TANKSHIP CORP.; MARINE TRANSPORT LINES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

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Preface

An attorney with many years of experience suffering the "slings and arrows" of litigation had occasion to read Fincher's Petition submitted in this matter. He advised counsel undersigned, in essence, that facts before this Court take the prize for egregious unfairness perpetrated by the legal system. As one jurist wrote, when a case is over,

> although a litigant may be disappointed in the outcome, he should leave the courthouse feeling that he has been treated fairly[.]

Anderson v. Sheppard, 856 F.2d 741, 745-746 (6th Cir. 1988). Estate of Fincher was not treated fairly in this case. Are the noble principles of Due Process of Law requiring notice before a party is stripped of important rights "just talk," or are they *living* principles that courts of law *must* follow?

I. Petitioner's Repeated Assertions of Lack of Notice and Lack of Fundamental Fairness Implicitly Raised the Constitutional Questions Now Urged for Review.

Respondents ignore literally pages of citations to the record found in the Petition (pp. 8-12), stating blithely that "there were no federal constitutional rights implicated or affected." As those citations show, however, Fincher repeatedly asserted to the state court that he had been deprived of notice – which no one disputes – and that this deprivation rendered the denial of his right to appellate review fundamentally unfair. Those two factors of notice and fundamental fairness are the two pillars of

Federal Due Process. The state court ruling, although resting ostensibly upon state law, necessarily and unavoidably "implicates an underlying question of federal law,"[1] and cannot be shielded from review on certiorari.[2] It has never been regarded as essential to review on certiorari that a federal-law issue be raised *expressly*. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) (record may show that federal claim was raised by implication; Court has not insisted upon "inflexible specificity.").

Moreover, this precise argument was rejected under very similar facts in *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 523 N.E.2d 851 (Ohio 1988), discussed in the Petition. In that case the Ohio Supreme Court held that the constitutional right to reasonable notice of an adverse judgment had been adequately raised in the court below where appellants argued

> that the notice of appeal was not filed until January 22, 1987, because they did not know, until January 9, 1987, that a judgment entry had been filed. Appellants' unrefuted affidavits to this effect clearly raise the issue of the right to reasonable notice of a final order. . . .

37 Ohio St.3d at 82.

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[1] *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986); *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[2] "What this Court *says* in the opinions in a particular case is not as important to the particular litigants as what this Court actually *does* with the case." *Brown v. Dade Christian Schools, Inc.*, 581 F.2d 472, 473 (5th Cir. 1978) (italics in the original.).

Respondents argue that Fincher should have briefed and argued the Federal constitutional questions in his Motion to Extend Time to File Appeal as of Right [App. 29-34]. However, it was clear from conversations with the trial judge's staff that the trial court recognized that a mistake had been made in failing to serve Fincher's counsel; that any dereliction was on the part of courthouse staff and not on Fincher's counsel; and that the trial court was receptive to a request for relief [App. 127, ¶¶ 9-10]. There was no occasion to "make a federal case" out of what appeared to be easily remedied under the state procedural rules permitting an extension of time to file an appeal.

Respondents similarly assert that Fincher should have briefed and argued federal-law issues at length in the response to the motion to dismiss the appeal filed in the Alabama Supreme Court. However, the issues raised by that motion were confined to whether the trial court had properly exercised its discretion under Alabama state law [App. 58-63]. It would not have been proper for Estate of Fincher to adopt a "kitchen sink" approach to pleading its response to the motion to dismiss. *See Tonti v. Petropoulos*, 656 F.2d 212, 220 (6th Cir. 1981) (decrying "kitchen sink" approach to pleading as "wasteful").

Respondents' assertion that Fincher ought to have filed an application for rehearing in the Alabama Supreme Court has no more merit. Respondents ignore the fact that the decision was 8-1. The majority opinion embodies a conviction that Fincher simply was not entitled to notice of the trial court's decision under the governing law. Fincher submits that making a more specific argument as to federal law had no reasonable prospect of

swaying the views of the state court. The law never requires vain and useless acts.[3]

II. The Decision in Question Is in Direct Conflict With Decisions of This Court and the Ohio Supreme Court.

Respondents' assertion that Fincher has failed to show that the decision of the court below conflicts with relevant decisions of this Court or the highest court of another state simply ignores the decisions of this Court cited in Fincher's Petition (pp. 12-22), and the decisions of the Ohio Supreme Court (pp. 22-25). A first-year law student would instantly recognize that the Ohio cases are "on all fours."

III. This Court Has the Power and the Duty to Prevent Fundamental Unfairness, Even Assuming the Matters at Issue Were Not Fully Raised Below.

Even assuming, without conceding, that the federal constitutional issues were not raised below, this does not deprive this Court of jurisdiction or pose any "insuperable bar" to review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). *See also Illinois v. Gates*, 462 U.S.

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[3] *See Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 97 (1980) (law does not require a futile act); *Hardin v. Hayes*, 52 F.3d 934, 938 (11th Cir. 1995); *Abdallah v. Abdallah*, 359 F.2d 170, 175 (3d Cir. 1966) ('the law, which is eminently practical, does not require the doing of a vain thing'); *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 461 (1st Cir. 1988) ("The law should not be construed idly to require parties to perform futile acts or engage in empty rituals.").

213, 219 (1983) (issue "not pressed or passed upon below," may present a prudential or discretionary restriction, not a per se lack of jurisdiction);[4] *Heath v. Alabama*, 474 U.S. 82, 87 (1985) (failure to raise below not jurisdictional.).

In a concurring opinion in *Webb v. Webb*, 451 U.S. 493, 502 (1981), Justice Powell states:

> [T]he Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. *Wood v. Georgia*, 450 U.S. 261, 265 (1981). See also, *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (finding plain error in an appeal from a state court).

"Fundamental unfairness" is precisely what the facts of this case present. Under a mandatory, non-discretionary provision of law, the state court had an imperative duty to give notice of the entry of the summary judgment rendered against Estate of Fincher. In five years of litigation, the state court had performed that duty without exception. The state court had established a mechanism for counsel to follow the status of their cases – by regularly checking their courthouse boxes. It is undisputed that Fincher's local counsel did this *nearly every day*. To require that Fincher's counsel should have been personally pestering overburdened court clerks, inquiring about

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[4] The Court cites *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974), as support for that proposition.

the status of the motion, is to ignore the reality of the way the real world functions.[5]

This Court has the power to examine the record to arrive at an independent judgment as to whether constitutional rights have been invaded *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442 (1964). The Court should exercise that power in this case and do justice by granting certiorari.

IV. Respondents Ignore Petitioner's Serious Claims of Unconstitutionality, Contenting Themselves With *Ipse Dixit* Assertions of Insubstantiality.

Fincher cited case after case in his Petition showing the egregious unfairness which resulted from his denial of his constitutional right to notice. Respondents do not touch this cogent argument with the proverbial ten-foot pole, contenting themselves with the unsupported *ipse dixit* assertion that the federal questions presented "are not substantial or meritorious." Respondents' Brief at 5. The meagerness of the response suggests powerfully that

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[5] One other matter deserves comment. In their brief Respondents suggest that Fincher's counsel should have inquired of their counsel about the entry of the Order (Respondents' Brief at 6). The sheer, unmitigated gall of this suggestion brings to mind the Yiddish word *chutzpah*. What the sworn affidavit testimony of record shows is that when Fincher's counsel did inquire of respondent's counsel as to what he knew concerning the trial court's disposition of the summary judgment motion, respondent's counsel gave answers deceptive in the extreme. *See* App. 102-104 (Fincher's brief detailing the incident); 127 (Carley Affidavit ¶ 8); 128 (Carley Affidavit ¶ 11).

Respondents have no response on the merits, and are desperate to procure a denial of relief on technicalities.

V. Respondents Misstate the Facts of the Case, Ignoring Their Duty to Cite to the Record.

In their response – such as it is – Respondents repeat a number of factual misstatements they have made previously, ignoring the appellate advocate's duty to cite to the record for contentions of fact. Petitioner underscores what he stated in his Petition: that motion hearings in Mobile County Circuit Court are not "on the record," and the trial judge never made any findings on the record clarifying precisely what happened on the day the motion for summary judgment was heard. Fincher's local counsel, Larry Moorer, disputed Respondents' claim that summary judgment was granted in open court [App. 118-119]. In the Alabama Supreme Court, Fincher suggested that the court might remand for clarification [App. 92-95], a suggestion the court denied *sub silentio*.

Respondents also state [Respondent's Brief at 6] that "[Fincher's] counsel failed to follow up on the results of the summary judgment hearing," despite the undisputed testimony of Larry Moorer that he was checking the courthouse distribution boxes nearly every day [App. 120].

VI. In the Alternative, the Court Should Remand This Cause to the State Court for Consideration of These Most Substantial Constitutional Questions.

Should the Court be disinclined to review these question on the record presented, at a minimum the Court should remand the cause pursuant to 28 U.S.C. § 2106[6] with directions for the Alabama state courts to consider further the federal constitutional questions. *See, e.g., Benton v. Maryland*, 395 U.S. 784, 798 (1969); *Morgan v. Garris*, 307 F.2d 179 (D.C.Cir. 1962). Indeed, two of this Court's decisions cited by Respondents point to the propriety of the Alabama state court considering these issues further on remand. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940) (remanding with invitation for state court to consider federal questions further); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 163 (1945) (concluding that further proceedings could be had in state court to litigate Commerce Clause issue). *See also Webb v. Webb*, 451 U.S. 493, 503 (1981) (Marshall, J., dissenting in part) (suggesting that Full Faith and Credit issue be remanded to Georgia courts).

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[6] 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Conclusion

Petitioner Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, respectfully prays that the Court grant a Writ of Certiorari to review the decision of the Alabama Supreme Court. In the alternative, Petitioner prays that the Court remand his cause to the state court with directions to consider further his federal claims.

DATED this 12th day of April, 2001 at Detroit, Michigan.

Respectfully submitted,

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